

The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (Part II)

LAWRENCE HERMAN*

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* President's Club Professor of Law Emeritus, The Ohio State University. I am grateful to Professors Yale Kamisar and George Dix for reading and commenting on an earlier version of this article. I acknowledge with thanks the work of my student research assistants Lori A. Black, J.D. '90, and Elise W. Porter, J.D. '91, both of whom provided valuable research and editorial assistance. Ms. Porter in addition strove to insure that the footnotes are in proper form—a thankless task for which I am particularly thankful.

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IV. CONSTITUTIONALIZATION AND SUPREME COURT INTERPRETATION

A. Introduction

The protection against compulsory self-incrimination originated in England and colonial America as a common law rule. It remained a common law rule in England, and is a common law rule today.⁵³³ In colonial America, the protection also received some statutory recognition,⁵³⁴ and, after the revolution, provisions prohibiting compulsory self-incrimination appeared in the federal bill of rights and in the constitutions of most of the states.⁵³⁵ Today, we invariably think of the protection in constitutional, rather than common law, terms.

The rule barring the admissibility of involuntary confessions also originated in England and America as a common law rule. It remained a common law rule in England until it was codified in 1984.⁵³⁶ In the United States, it was generally dealt with as a common law rule until 1936.⁵³⁷ In that

⁵³³ See PHIPSON ON EVIDENCE ch. 15-36 (13th ed. 1982). Some aspects of the privilege have been codified in England. See, e.g., Criminal Evidence Act, 1898, 61 Vict., ch. 36, § 1(a) (Eng.) (accused shall not be called as a witness except upon his own application).

⁵³⁴ See LEVY, *supra* note 13, at 344-45 (*Massachusetts Body of Liberties of 1641* contained an equivocal protection against compelling confessions by torture), 354-55 (Connecticut statute of 1673 contained unequivocal protection against torture), 358 (Virginia statute of 1677 recognized protection against compulsory self-incrimination for witnesses).

⁵³⁵ See LEVY, *supra* note 13, at 405-32.

⁵³⁶ Police and Criminal Evidence Act of 1984, § 76 (Eng.).

⁵³⁷ That the involuntary confession rule was generally perceived as a common law rule appears from its treatment in evidence treatises such as 1 SIMON GREENLEAF, EVIDENCE §§ 213-235 (Boston, Little, Brown 6th ed. 1852); 1 SIMON GREENLEAF, EVIDENCE §§ 219-35 (Wigmore rev.) (Boston, Little, Brown 16th ed. 1899); 2 JOHN H. WIGMORE, EVIDENCE §§ 815-67 (2d ed. 1923). See also 1 MCCORMICK, *supra* note 417, at § 146.

In *Bram v. United States*, 168 U.S. 532 (1897), the Court held that exclusion of an involuntary confession was dictated by the Fifth Amendment's self-incrimination provision.

year, the United States Supreme Court decided *Brown v. Mississippi*,⁵³⁸ a case of confession by governmental torture. In *Brown*, the Court for the first time held an involuntary confession inadmissible in a *state* criminal case. Since the Court lacks authority to prescribe common law rules of evidence for state proceedings, and there was no applicable federal statute, it had to base inadmissibility on the Constitution. Its menu of constitutional choices, however, did not include the privilege against compulsory self-incrimination, which was not then applicable to state criminal proceedings.⁵³⁹ Rather, the only relevant constitutional provision was the Due Process Clause of the Fourteenth Amendment. The Court used what was available, and the confession rule became constitutionalized. Between 1936 and 1964, the Court gave the confession rule its greatest development and direction by deciding more than thirty state cases involving claims of involuntariness.⁵⁴⁰ It resolved all of them under the Due Process Clause. As a result, we invariably think of the confession rule today as a federal due process doctrine.⁵⁴¹

In 1964, in *Malloy v. Hogan*,⁵⁴² the Court partially overruled *Twining v. New Jersey*⁵⁴³ and *Adamson v. California*⁵⁴⁴ and held that the privilege was applicable to state proceedings. In an effort to demonstrate that its decision was not radical and that *Twining* and *Adamson* had already been undercut, the Court said, "Decisions of the Court since *Twining* and *Adamson* have departed from the . . . view expressed in those cases. We discuss first the decisions which forbid the use of coerced confessions in state criminal prosecutions."⁵⁴⁵ In an article published in the same year, I said that the Court had performed a "shotgun wedding of the privilege to the confessions rule."⁵⁴⁶ I made that characterization with scant consideration of the history, operations, and objectives of both the common law and the constitutional protections. I now want to revisit the subject with greater care.

As we have already seen, the distance between the *common law* privilege and the *common law* confession rule is not as great as some have claimed. What can be said of the two *constitutional* protections? In answering this

This constitutional theory was ignored in subsequent cases prior to the mid-1960s. See Lawrence Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 453 n.19 (1964).

⁵³⁸ 297 U.S. 278 (1936).

⁵³⁹ See *Adamson v. California*, 332 U.S. 46 (1947); *Twining v. New Jersey*, 211 U.S. 78 (1908). The cases are discussed in Herman, *supra* note 537, at 462-66.

⁵⁴⁰ See Comment, *The Coerced Confession Cases in Search of a Rationale*, 31 U. CHI. L. REV. 313 n.1 (1964).

⁵⁴¹ See 1 MCCORMICK, *supra* note 417, at § 146.

⁵⁴² 378 U.S. 1 (1964).

⁵⁴³ 211 U.S. 78 (1908).

⁵⁴⁴ 332 U.S. 46 (1947).

⁵⁴⁵ 378 U.S. at 6.

⁵⁴⁶ Herman, *supra* note 537, at 465.

question, we should follow our previous mode of analysis by inquiring into the history, operations, and objectives of both constitutional doctrines. Only such an analysis will enable us to determine the existence and extent of differences between the constitutional doctrines.

B. History of the Constitutional Protections

The history of the constitutional protections has, in large part, already been described. Each constitutional protection came from a common law analogue. The common law protections had a significant overlap, yet in a few respects were distinct. The constitutional right against compelled incrimination was adopted in 1791, as was the Due Process Clause of the Fifth Amendment. The Due Process Clause of the Fourteenth Amendment was not adopted until 1868.

As our earlier survey established, both federal and state courts relied primarily on the common law confession rule in deciding whether confessions were admissible. Neither the constitutional protection against compulsory self-incrimination nor any other constitutional provision played a prominent part through 1850. In 1897, the Supreme Court held in *Bram v. United States*⁵⁴⁷ that the admissibility of confessions in federal criminal proceedings was to be determined by applying the Fifth Amendment's self-incrimination provision. *Bram* had little impact, however,⁵⁴⁸ and, as late as 1951, it was not clear whether the exclusion of involuntary confessions in *federal* cases was based on the Fifth Amendment's self-incrimination provision, the Fifth Amendment's due process provision, or the common law confession rule.⁵⁴⁹ By contrast, as already noted, beginning in 1936, the Supreme Court used the Fourteenth Amendment's due process provision in *state* proceedings, the Fifth Amendment's self-incrimination provision being inapplicable until 1964. Since 1966, the Fifth Amendment's privilege, as construed and applied in *Miranda*, has occupied center stage in both state and federal proceedings as long as the case involves custodial interrogation by the police—the triggering elements of *Miranda*. If it does, *Miranda*'s advice/waiver test comes into play. If it does not, *Miranda* is inapplicable. In the latter event, one might think that courts would ask whether the suspect had been compelled to speak in violation of the Fifth Amendment privilege, but courts seldom do. Instead, they ordinarily resolve the admissibility issue by invoking the *due process rule* and asking whether the confession was involuntary.⁵⁵⁰

⁵⁴⁷ 168 U.S. 532 (1897).

⁵⁴⁸ See Herman, *supra* note 537, at 453 n.19. For a thorough discussion of *Bram* and post-*Bram* cases, see Stephen A. Saltzburg, *Miranda v. Arizona Revisited: Constitutional Law or Judicial Fiat*, 26 WASHBURN L.J. 1, 4-12 (1986).

⁵⁴⁹ See *United States v. Carignan*, 342 U.S. 36, 41 (1951).

⁵⁵⁰ See *Colorado v. Connelly*, 479 U.S. 157, 163 (1986); *Miller v. Fenton*, 474 U.S. 104, 110 (1985). In *Beecher v. Alabama*, 389 U.S. 35 (1967) (per curiam), the crucial

The history of the constitutional protections suggests similarity. Both constitutional protections derive from significantly overlapping common law doctrines. Moreover, an aversion to torture is a part of the backdrop of both protections. The constitutional privilege was preceded by statutes that prohibited obtaining confessions by torture.⁵⁵¹ The due process protection was announced in a case of confession by torture,⁵⁵² and the Court has noted that the very idea of due process of law expresses an aversion to "illegal confinement, torture and extortion of confessions."⁵⁵³ Although history suggests similarity, history cannot be determinative, for history alone cannot tell us how similar the constitutional protections are. In order to answer that question, we must know how the protections operate and what their objectives are.

C. Operations of the Constitutional Protections⁵⁵⁴

1. Introduction

In our earlier examination and comparison of the operations of the common law protections, we found many similarities and a few differences. Some of the asserted differences were illusory, and others were slight and did not support the conclusion that the protections were wholly distinct. The significant difference involved confessions that had been induced by (1) threats and promises made by private persons or (2) promises made and kept by

events occurred after *Malloy* but before *Miranda*. *Miranda*'s advice/waiver formula was therefore inapplicable, see *Johnson v. New Jersey*, 384 U.S. 719 (1966) (*Miranda* applies only to trials beginning after the date on which *Miranda* was decided), but the Fifth Amendment's stricture against compelled self-incrimination could have been used. Although four justices believed that the use of the confession violated the Fifth Amendment, the Court held the confession inadmissible under the due process rule. Whether courts should prefer the due process rule to the Fifth Amendment's privilege is addressed *infra* at notes 641-66 and accompanying text.

⁵⁵¹ See *supra* note 534 and accompanying text.

⁵⁵² See *supra* note 538 and accompanying text.

⁵⁵³ *Chambers v. Florida*, 309 U.S. 227, 236 (1940). See also *Watts v. Indiana*, 338 U.S. 49, 54 (1949) (expressing an aversion to "Star Chamber" tactics).

⁵⁵⁴ In dealing with operational aspects, I shall not consider the fact that the failure to give advice or obtain a waiver is fatal under *Miranda*'s interpretation of the Fifth Amendment in cases of police custodial interrogation, but is merely a relevant datum under the due process approach. That difference, although substantial, is unimportant for present purposes. Lurking barely off-stage in this Article is the controversial question of whether *Miranda*'s advice/waiver requirements make sense as an interpretation of the Fifth Amendment. That being so, it seems foolish to accept the requirements at face value in this Article. For my purposes, it makes more sense to compare the operation of the due process rule with the operation of *Bram*'s version of the Fifth Amendment.

governmental agents. Here there was no strong argument that the privilege had been violated, so inadmissibility had to be based on an independent concern for reliability. All other involuntary confessions, however, could be excluded under the privilege, and a broader confession rule therefore served no purpose. Since the common law protections gave rise to today's constitutional protections, it would not be surprising if the same key differences continued.⁵⁵⁵

2. Operation of the Constitutional Privilege

The Supreme Court has the ultimate authority to shape the operation of the constitutional protections. The Court's decisions establish a number of points regarding the operation of the privilege.

(a) The privilege protects only against official action.⁵⁵⁶ Private action, no matter how coercive it might be, is not prohibited by the privilege, and confessions obtained by private compulsion are not inadmissible under the privilege, absent collusion between governmental and private actors.

(b) Not all governmental action relating to a confession is prohibited by the privilege. The privilege prohibits only governmental "coercion" or "overreaching."⁵⁵⁷

(c) The operation of the privilege is multi-faceted. If a claim of privilege is honored by the questioner, the witness will be permitted to remain silent.⁵⁵⁸ If the questioner rejects the claim of privilege and seeks to have a sanction imposed on the witness, the privilege may be used to avoid the sanction.⁵⁵⁹ The privilege has its own exclusionary rule. If the witness has been compelled to answer in violation of the privilege, the answer will be inadmissible in a

⁵⁵⁵ In the following discussion, I do not intend to reconsider most of the asserted differences that proved to be illusory or insubstantial in the common law context. These differences are illusory or insubstantial in the constitutional context as well.

⁵⁵⁶ See *Colorado v. Connelly*, 479 U.S. 157, 170 (1986). This aspect of *Connelly* was neither novel nor controversial. None of the provisions of the Bill of Rights is triggered by wholly private action. See LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-3 (2d ed. 1988). The same was true of the common law privilege. See *supra* notes 463-64 and accompanying text.

⁵⁵⁷ *Colorado v. Connelly*, 479 U.S. 157, 170 (1986). See also *Hoffa v. United States*, 385 U.S. 293, 304 (1966) ("[A] necessary element of compulsory self-incrimination is some kind of compulsion.").

⁵⁵⁸ See, e.g., *Doyle v. Ohio*, 426 U.S. 610 (1976) (police desisted from interrogating suspect who asserted the privilege after receiving *Miranda* warnings; suspect's silence not admissible to impeach his trial testimony that he had been "framed").

⁵⁵⁹ See, e.g., *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) (loss of unpaid position in political party); *Lefkowitz v. Turley*, 414 U.S. 70 (1973) (loss of government contracts); *Spevack v. Klein*, 385 U.S. 511 (1967) (disbarment).

subsequent criminal proceeding.⁵⁶⁰ Although the privilege is multi-faceted, the various uses of the privilege do not occur with equal frequency. The first two uses dominate. As a result, witnesses are seldom compelled to answer over their legitimate claim of privilege, and there is seldom occasion to bar the admissibility of a compelled answer.

(d) If a witness legitimately asserts the privilege, the government's only alternatives are either to honor the privilege or to offer immunity in exchange for information.⁵⁶¹ An offer of use and derivative-use immunity will trump the privilege.⁵⁶² If the witness persists in refusing to answer, sanctions may be imposed on the witness.

(e) In determining whether a witness has been "compelled" to speak in violation of the privilege, the Court has not used a "totality of the circumstances" approach. It has not considered the personal characteristics of the witness, the environment in which the questioning occurs, or the manner in which the questioning takes place. Rather, in an ill-defined way, it has made an abstract assessment of the power or force of the sanction imposed on silence. If the power or force reaches a certain level, also ill-defined, compulsion exists, and the witness will be protected under the privilege.⁵⁶³ For example, in *Garrity v. New Jersey*,⁵⁶⁴ police officers gave unimmunized, incriminating answers at an inquiry into ticket-fixing after being told that they would be fired if they claimed the privilege. The Court held that the threat constituted compulsion in violation of the privilege. It never even mentioned the facts, which Justice Harlan noted in his dissent, that all of the officers were advised that they had a right to remain silent, three of the officers were represented by counsel, a fourth officer had decided that counsel was not necessary, the interrogation took place in familiar surroundings, and the interrogation was both brief and civilized.⁵⁶⁵

(f) Related to the point made in paragraph (e) is another: in administering the various functions of the privilege, the Court ordinarily does not balance the government's interest in obtaining information against the individual's interest in avoiding compulsion. Whether a case involves the admissibility of a compelled statement in a criminal proceeding or a witness's effort to avoid a sanction for nondisclosure, the Court normally ignores the government's interest in obtaining information. For example, in *Garrity*,⁵⁶⁶ the officers'

⁵⁶⁰ See *Baltimore City Dep't of Social Services v. Bouknight*, 493 U.S. 549, 562 (1990) (citing many cases).

⁵⁶¹ See *Lefkowitz v. Turley*, 414 U.S. 70, 79, 84 (1973).

⁵⁶² See *Kastigar v. United States*, 406 U.S. 441 (1972).

⁵⁶³ The analytical process used by the Court is described in greater detail and thoughtfully criticized in MARK L. BERGER, *TAKING THE FIFTH* 201-09 (1980).

⁵⁶⁴ 385 U.S. 493 (1967).

⁵⁶⁵ 385 U.S. at 502-06 (Harlan, J., dissenting).

⁵⁶⁶ 385 U.S. 493 (1967).

unimmunized, incriminating answers were held inadmissible in a subsequent criminal proceeding notwithstanding the state's undeniably strong interest in rooting out official corruption. A similar result was reached in *New Jersey v. Portash*,⁵⁶⁷ in which a municipal official was compelled by threat of contempt to make immunized statements at a grand jury proceeding. The Court held that the compelled statements could not be used to impeach Portash's testimony at a subsequent prosecution for misconduct in office. Although the State argued that it had a strong interest in deterring perjury, the Court held that the threat of contempt was quintessential compulsion and that "[balancing] is impermissible."⁵⁶⁸

The Court has used the same approach in relieving persons of the obligation to incriminate themselves and of disabilities imposed for failure to divulge incriminating information. For example, in *Gardner v. Broderick*,⁵⁶⁹ the Court held that it was unconstitutional to fire a police officer for refusing to give unimmunized, incriminating information at an official inquiry into police corruption. The Court explicitly refused to weigh the state's interest in protecting the public from dishonest employees. Nine years later, in *Lefkowitz v. Cunningham*,⁵⁷⁰ the Court held that it was unconstitutional to oust a political party official from office and to bar him from holding office for refusal to give unimmunized, incriminating information at a grand jury inquiry into his conduct in office. Writing for the Court, Chief Justice Burger refused to weigh the interest in fostering "public confidence in the integrity of [the state's] political process."⁵⁷¹ The Court has followed the same course in many other cases.⁵⁷²

There is a simple explanation for the Court's unwillingness to balance the government's interest in obtaining information against the individual's interest

⁵⁶⁷ 440 U.S. 450 (1979).

⁵⁶⁸ *Id.* at 459. Once the trial judge ruled that the statements were admissible to impeach, Portash decided not to testify in his own behalf. Hence, Portash's statements were not directly used against him. The Court analyzed the case, however, as though the statements had been used.

⁵⁶⁹ 392 U.S. 273 (1968).

⁵⁷⁰ 431 U.S. 801 (1977).

⁵⁷¹ *Id.* at 808.

⁵⁷² In none of the following cases did the Court weigh the governmental interest in obtaining information: *Lefkowitz v. Turley*, 414 U.S. 70 (1973) (forfeiture of present and future government contracts); *Leary v. United States*, 395 U.S. 6 (1969) (transfer tax on marijuana); *Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation*, 392 U.S. 280 (1968) (loss of public employment); *Haynes v. United States*, 390 U.S. 85 (1968) (requirement of registration of guns commonly used by criminals); *Marchetti v. United States*, 390 U.S. 39 (1968) (requirement that gamblers register with government agency); *Spevack v. Klein*, 385 U.S. 511 (1967) (disbarment); *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965) (requirement that Communists register with government agency).

in avoiding compulsion: the Court believes that the tension between governmental and individual interests can best be adjusted by use of immunity. If immunity is granted, the state can then obtain the information and use it to the witness's disadvantage in proceedings to impose civil sanctions. This partially vindicates the governmental interest while protecting the accused in criminal proceedings.⁵⁷³

On infrequent occasion the Court's holdings have diverged from those discussed above. In *Shapiro v. United States*,⁵⁷⁴ the Court held that it was constitutional to use in a criminal proceeding information contained in business records that the defendant had been required to keep and disclose to the government. The requirement had been imposed as part of a governmental effort to control prices during wartime, and the Court was influenced by the government's strong interest in both controlling prices and punishing violations.⁵⁷⁵ Twenty-three years later, in *California v. Byers*,⁵⁷⁶ the Court upheld a conviction for violating a statute that required accident-involved drivers to stop and identify themselves. The principal purpose of the "stop and identify" requirement was to facilitate the financial responsibility of drivers, rather than to impose criminal liability,⁵⁷⁷ and the Court took explicit note of that fact.⁵⁷⁸ Most recently, in *Baltimore City Department of Social Services v.*

⁵⁷³ For cases in which the Court has suggested that the government must grant immunity to obtain compulsory disclosure, see *Lefkowitz v. Turley*, 414 U.S. 70, 79 (1973); *Haynes v. United States*, 370 U.S. 85, 98 (1968). See also *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965) (statutory immunity held unconstitutionally narrow).

⁵⁷⁴ 335 U.S. 1 (1948). The case is discussed at length in *BERGER*, *supra* note 85, at 183-85.

⁵⁷⁵ See 335 U.S. at 32-33; see also John H. Mansfield, *The Albertson Case: Conflict between the Privilege Against Self Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103, 132 ("[T]he war power . . . may have had some influence on the *Shapiro* decision . . .").

⁵⁷⁶ 402 U.S. 424 (1971).

⁵⁷⁷ See *id.* at 430.

⁵⁷⁸ *Byers* was a 4-1-4 decision with Justice Harlan casting the crucial vote. Chief Justice Burger's plurality opinion states,

Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved by balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.

402 U.S. at 427. The plurality then held that the compelled identification was neither sufficiently incriminating, *id.* at 431, nor testimonial, *id.* at 431-34, and that the privilege was therefore inapplicable. Justice Harlan, who disagreed with the plurality on both points, *id.* at 435-36, also engaged in balancing, *id.* at 449, and concluded that the state's interest

Bouknight,⁵⁷⁹ the Court refused to permit the invocation of the privilege by a mother who was ordered to produce her child in court on threat of incarceration for contempt. Even though the Court recognized that the act of production might be incriminating,⁵⁸⁰ it held that compulsory production was authorized by a combination of two factors. They were that the mother had been given only conditional custody of the child⁵⁸¹ and that production was sought as part of a regulatory, non-criminal program which sought to protect the best interests of the child.⁵⁸²

A common thread runs through the Fifth Amendment cases in which the Court has engaged in balancing. In *Shapiro*, *Byers* and *Bouknight*, the Court believed that the governmental interest was essentially non-criminal and should not be frustrated by a constitutional protection that was intended to operate in criminal proceedings.⁵⁸³ By contrast, when the government interest is essentially criminal, the Court does not engage in balancing.⁵⁸⁴ Indeed, even as to essentially non-criminal, regulatory schemes which have a criminal enforcement side, it is not clear that compelled information may be used in criminal enforcement proceedings. Although the information was held admissible in *Shapiro*, and Justice Harlan's concurrence in *Byers* suggests admissibility,⁵⁸⁵ *Bouknight* even more strongly suggests that compelled information is inadmissible.⁵⁸⁶ Consequently, there is reason to believe that the

in deterring careless driving and insuring financial responsibility outweighed the driver's interest in avoiding compulsory incrimination. *Id.* at 450-57.

⁵⁷⁹ 493 U.S. 549 (1990).

⁵⁸⁰ *See id.* at 555.

⁵⁸¹ *See id.* at 559-60.

⁵⁸² *See id.* at 555-61.

⁵⁸³ *See* Baltimore City Dep't of Social Svcs. v. Bouknight, 493 U.S. 549, 555-61 (1990); California v. Byers, 402 U.S. 424, 427-31 (1971); Shapiro v. United States, 335 U.S. 1, 17 (1948).

⁵⁸⁴ *See* New Jersey v. Portash, 440 U.S. 450 (1979), discussed *supra* note 567 and accompanying text. *See also* the concurring opinion in *Byers* in which Justice Harlan said:

[T]he primary context from which the privilege emerges is that of the criminal process, in both the investigatory and trial phases. When applied in that context, the sole governmental interest that the privilege defeats is the enforcement of law through criminal sanctions. And, with regard to the witness' privilege, the judge can, for the most part, draw the line between "real" and "imaginary" risks of incrimination in marginal cases, thereby offsetting the tendency for the privilege to become an absolute right not to disclose any information at all.

402 U.S. at 440.

⁵⁸⁵ *See* 402 U.S. at 443, 447-48, 451.

⁵⁸⁶

We are not called upon to define the precise limitations that may exist upon the State's ability to use the testimonial aspects of Bouknight's act of production in

Court may be willing to use immunity even in the regulatory area as the preferred device for resolving the tension between governmental and individual interests.

(g) The final operational point that merits our present attention is that the constitutional protection against compulsory self-incrimination guards against compelled admissions as well as full confessions.⁵⁸⁷

3. *Operation of the Due Process Rule*

Just as the Supreme Court has shaped the operation of the constitutional privilege, so it has shaped the operation of the due process rule barring involuntary confessions.

(a) In common with the privilege, the due process rule protects only against official action. The common law confession rule barred putatively unreliable confessions obtained by persons "in authority."⁵⁸⁸ Governmental actors (magistrates or constables, for example) were always "in authority," but the term was not limited to them. It also included private persons who were concerned in the apprehension and prosecution of the suspect. For example, the victim was a person in authority. So were the suspect's employer and members of the employer's family.⁵⁸⁹ Under the due process rule, some lower courts

subsequent criminal proceedings. But we note that imposition of such limitations is not foreclosed. The same custodial role that limited the ability to resist the production order may give rise to corresponding limitations upon the direct and indirect use of that testimony. The State's regulatory requirement in the usual case may neither compel incriminating testimony nor aid in a criminal prosecution, but the Fifth Amendment protections are not thereby necessarily unavailable to the person who complies with the regulatory requirement after invoking the privilege and subsequently faces prosecution. In a broad range of contexts, the Fifth Amendment limits prosecutors' ability to use testimony that has been compelled.

493 U.S. at 561-62 (citations and parenthetical quotations and summaries omitted). Among the cited cases are *New Jersey v. Portash*, 440 U.S. 450 (1979); *Leary v. United States*, 395 U.S. 6 (1969); *Haynes v. United States*, 390 U.S. 85 (1968); *Marchetti v. United States*, 390 U.S. 39 (1968); *Garrity v. New Jersey*, 385 U.S. 495 (1967).

⁵⁸⁷ This is one of the less controversial statements in *Miranda*, 384 U.S. 436, 476-77 (1966).

⁵⁸⁸ HENRY H. JOY, *ADMISSIBILITY OF CONFESSIONS* *5, 13 (Philadelphia, John S. Little II 1843).

⁵⁸⁹ *Id.* at *5-33, 13-28. See also George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 302 n.372 (1988). Professor Dix sensibly prefers to read the common law cases as supporting two somewhat different rules: (1) a confession is inadmissible if induced by a promise made by a person in authority; and (2) a confession is inadmissible if induced by a threat made by anyone. *Id.* at 302.

followed the common law by holding that a confession is inadmissible if obtained by private violence.⁵⁹⁰ Thus, as noted earlier, there was an operational difference between the confession rule and the privilege. The Supreme Court's decision in *Colorado v. Connelly*,⁵⁹¹ however, requires official action to trigger the due process rule as well as the privilege. Connelly walked up to a police officer and admitted committing murder. Shortly afterwards, a detective arrived and asked Connelly "what he had on his mind."⁵⁹² Connelly gave some of the details of an unsolved murder and eventually led officers to the scene of the crime. At the time he confessed, Connelly was a schizophrenic who suffered from a "command auditory hallucination": he heard the voice of God ordering him to confess or kill himself. The Supreme Court held that the due process rule required "police conduct causally related to the confession."⁵⁹³ In a dictum, the Court stated that private acts of violence would not make a confession inadmissible.⁵⁹⁴ By limiting the due process rule to official conduct that is causally related to the confession, *Connelly* has obliterated an important common law distinction and made the due process rule more like the constitutional privilege.

(b) Not all governmental conduct will suffice to make a confession inadmissible under the due process rule. In *Connelly*, the Court variously described the required conduct as "coercive government misconduct,"⁵⁹⁵ "police overreaching,"⁵⁹⁶ and "coercive police conduct."⁵⁹⁷ The Court did not define these terms, but it is clear that the Court's concept of governmental coercion or overreaching does not include either a detective's prompting of a statement or the prosecution's use of a statement in evidence against the maker.⁵⁹⁸

(c) In common with the constitutional privilege, the operation of the due process rule is multifaceted, but not in the same way or to the same extent. Unlike the privilege, the due process rule functions primarily to exclude confessions. Although it also facilitates silence, it does so only in cases in which an interrogator, aware of the content of the due process rule, chooses to follow it and not press for an answer. The due process rule is ordinarily of no help to a suspect whose refusal to answer is "punished" by a continuation of

⁵⁹⁰ See 3 WIGMORE, *supra* note 80, at § 833.

⁵⁹¹ 479 U.S. 157 (1986).

⁵⁹² *Id.* at 160.

⁵⁹³ *Id.* at 164.

⁵⁹⁴ "The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause." *Id.* at 166. Whether this dictum will stand the test of time remains to be seen.

⁵⁹⁵ *Id.* at 163.

⁵⁹⁶ *Id.* at 163, 164.

⁵⁹⁷ *Id.* at 164.

⁵⁹⁸ *Id.* at 165 (use of confession does not suffice).

custody or other abuse. If the suspect does not have a lawyer who is aware of what is happening and seeks habeas corpus relief, there is nothing the suspect can do. The same would be true, however, if the privilege were asserted, rejected and "punished" in a secret proceeding.

(d) Unlike the privilege, the due process protection does not offer immunity as the device for resolving the tension between the government's interest in obtaining information and the individual's interest in avoiding compulsory self-incrimination. If a suspect refuses to answer questions, the interrogator will either press for an answer or desist, but will not confer immunity.⁵⁹⁹ There is nothing intrinsic to the due process rule, however, that would prohibit the interrogator from seeking immunity. Thus, immunity does not present an intrinsic operational difference between the due process rule and the privilege. It does, however, raise a practical problem: under typical immunity statutes, police officers have not been given the authority to grant or seek immunity.⁶⁰⁰ Nor do they want the authority. Rather, they want to get statements that can be used at trial against the maker, and immunity would disserve this purpose.

(e) Unlike the privilege, the due process protection requires a court to consider the "totality of circumstances" in determining whether a confession is involuntary. This comprehends the personal characteristics of the suspect and the environment and techniques of interrogation.⁶⁰¹ At the same time, in more than a few cases, the Supreme Court has stressed single, coercive factors in holding that a confession was involuntary.⁶⁰² These cases tend to blunt any distinction between the due process protection and the privilege.

(f) Unlike the privilege, the due process rule frankly acknowledges balancing as a norm:

⁵⁹⁹ Lest I be misunderstood, I want to repeat that I am not concerned with *Miranda* at the present time. Under *Miranda* and its progeny, if a suspect asserts his right to remain silent, the interrogator must scrupulously honor the assertion. This requires immediate disengagement, but does not prohibit a resumption of questioning after a period of time. *Michigan v. Mosley*, 423 U.S. 96 (1975). If the suspect asserts his right to counsel, the interrogator must disengage and may not reengage until the suspect opens the door. *Edwards v. Arizona*, 451 U.S. 477 (1981). It does not take a lot to open the door. See *Oregon v. Bradshaw*, 462 U.S. 1039 (1983) (when the suspect asked what was going to happen to him, he opened the door to a resumption of questioning) (plurality opinion).

⁶⁰⁰ See, e.g., 18 U.S.C. §§ 6001-6003 (1988); OHIO REV. CODE ANN. § 2945.44 (Anderson 1987); N.Y. CRIM. PROC. LAW §§ 50.20, 50.30 (McKinney 1992).

⁶⁰¹ See *Schneekloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (dictum); Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 745 (1987).

⁶⁰² See, e.g., *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (36 consecutive hours of relay interrogation); *Brown v. Mississippi*, 297 U.S. 278 (1936) (brutal physical force).

"[V]oluntariness" has reflected an accommodation of the complex of values implicated in police questioning of a suspect. At one end of the spectrum is the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws . . . At the other end of the spectrum is the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice.

This Court's decisions reflect a frank recognition that the Constitution requires the sacrifice of neither security nor liberty.⁶⁰³

Insofar as the privilege is concerned, balancing is not the norm in any context and is particularly inappropriate in the context of ordinary criminal law enforcement divorced from essentially civil regulatory schemes.⁶⁰⁴ Insofar as the due process rule is concerned, however, balancing is the norm in determining whether a confession is involuntary enough to be excluded from evidence in any criminal case.⁶⁰⁵ This is a significant difference between the two constitutional protections.⁶⁰⁶

(g) In common with the privilege, the due process rule applies to admissions as well as confessions.⁶⁰⁷

4. Operations Compared

When we compare the operations of the constitutional privilege and the due process confession rule, we find numerous similarities. Both deal with confessions and admissions. Both are triggered by official action only; both are concerned only with "coercion" or "overreaching;" and both facilitate silence and have an exclusionary effect, although, as was also the case with their common law analogues, their primary and secondary roles are reversed. The

⁶⁰³ *Schneekloth*, 412 U.S. at 224-25 (dictum).

⁶⁰⁴ See *supra* notes 566-86 and accompanying text.

⁶⁰⁵ In *Crooker v. California*, 357 U.S. 433 (1958), the Court held a confession admissible as voluntary even though the police denied the suspect's repeated requests to see counsel. The Court's rationale, which obviously involved balancing, was that requiring the police to honor a request for counsel would have a "devastating effect" on police interrogation. *Id.* at 441. The case is discussed in Yale Kamisar, *Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REF. 537, 569-71 (1990) [hereinafter *Kamisar, Reply*].

⁶⁰⁶ Insofar as the privilege is concerned, balancing is a phenomenon associated with the emergence of the regulatory state. See BERGER, *supra* note 85, at 182-92. Since the regulatory state emerged *after* the constitutionalization of the privilege, one does not find balancing being used in connection with the common law privilege. Consequently, I omitted any reference to balancing in discussing and comparing the common law protections.

⁶⁰⁷ 3 WIGMORE, *supra* note 80, § 821, at 322-28.

most substantial difference lies in balancing. A less substantial difference is that due process analysis sometimes requires a consideration of the "totality of the circumstances." Thus, as they have been construed and applied by the Supreme Court, both protections operate in similar fashion. Indeed, given the changes wrought by *Connelly*, the two constitutional protections are more alike than were their common law counterparts.

D. Objectives of the Constitutional Protections

1. Introduction

In our earlier examination and comparison of the objectives of the common law protections, we found important similarities. The common law privilege was intended to reflect the values inherent in individual sovereignty. These values are autonomy, dignity, and privacy. Underlying them are separate interests in bodily integrity and mental integrity (repose, peace of mind, and control of information about one's self). In addition, we attributed to the common law privilege a concern (secondary rather than primary) that confessions be reliable. The same concern for reliability (primary, however, rather than secondary) underlay the common law confession rule. Apart from reliability, however, the confession rule was not concerned with the calculus of individual sovereignty. That a confession was induced by a *broken* promise did not make it inadmissible, according to *Warickshall*. Rather, the only test was whether the promise might induce an innocent person to confess falsely.

Since the common law protections gave rise to today's constitutional protections, it would not be surprising if all or some of the common law values and interests informed the constitutional protections.

2. Objectives of the Constitutional Privilege⁶⁰⁸

The drafting history of the Fifth Amendment is unrevealing,⁶⁰⁹ so we cannot turn to it as a source of information. Rather, our search for the objectives of the constitutional privilege must focus on the decisions of the Supreme Court and the commentary they have generated.

⁶⁰⁸ I feel constrained to repeat the statement I made before I compared the objectives of the common law protections. See *supra* note 428. I am seeking only to identify the objectives commonly attributed to the constitutional privilege or those that may be fairly inferred. My only purpose is to compare the objectives with the objectives of the due process confession rule. I am not seeking justifications for either constitutional protection. Thus, I am not concerned that some objective may not suffice to explain all of the uses to which a particular constitutional protection has been put or all of the prohibitions that it may embody.

⁶⁰⁹ See LEVY, *supra* note 13, at 414–31.

In *Brown v. Walker*,⁶¹⁰ one of its early disquisitions on the constitutional privilege, the Court said:

The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. . . . So deeply did the iniquities of the ancient system impress themselves on the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.⁶¹¹

Although this passage attributes to the constitutional privilege the objectives underlying the common law protection, the Court did not particularize its understanding of the objectives. Justice Field, however, sought to do so in his dissenting opinion:

The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to every one, and needs no illustration. It is plain to every person who gives the subject a moment's thought.

A sense of personal degradation in being compelled to incriminate one's self must create a feeling of abhorrence in the community at its attempted enforcement.⁶¹²

One may infer from this statement that the constitutional privilege was intended to buttress the values of dignity and privacy and the interests in peace of mind and controlling information about one's self.

Sixty-eight years later, in *Murphy v. Waterfront Commission*,⁶¹³ the Court essayed its first detailed statement of the objectives of the constitutional privilege, referring to them as "policies":

I. The Policies of the Privilege

The privilege against self-incrimination "registers an important advance in the development of our liberty—one of the great landmarks in man's struggle to make himself civilized." It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to

⁶¹⁰ 161 U.S. 591 (1896).

⁶¹¹ *Id.* at 596-97.

⁶¹² *Id.* at 637.

⁶¹³ 378 U.S. 52 (1964).

the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load;" our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life;" our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."⁶¹⁴

There can be no doubt that this statement invests the constitutional privilege with all of the values and interests that underlay the common law privilege: the values of autonomy, dignity, privacy, and reliability, and the interests in bodily and mental integrity. This is the settled view of the scholarly literature,⁶¹⁵ and it has been confirmed in the cases decided after *Murphy*.⁶¹⁶ As was true of the

⁶¹⁴ *Id.* at 55 (internal citations omitted). This statement has been quoted often and criticized almost as often. See, e.g., BERGER, *supra* note 85, at 26; see also 8 WIGMORE, *supra* note 3, § 2251, which antedates *Murphy*, but critically analyzes similar policy considerations. A brief, but useful, discussion of the issue may be found in YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 698-702 (7th ed. 1990).

⁶¹⁵ Professor Berger has perceived in the quotation from *Murphy* all of the values and interests that inform the common law protection. BERGER, *supra* note 85, at 26. The authors of MCCORMICK ON EVIDENCE (John W. Strong ed., 4th ed. 1992) have identified the value of dignity, *id.* § 114, at 424; § 118, at 433, and the underlying interest in bodily integrity and freedom from torture. *Id.* § 118, at 433. Professor Arenella has identified the values of privacy, dignity, autonomy, and reliability, Peter Arenella, *Schmerber and the Privilege Against Self-Incrimination: A Reappraisal*, 20 AM. CRIM. L. REV. 31, 37, 40 (1982), although he downplays the reliability value. *Id.* at 40. Professor Fried has observed that forcing a person to reveal self-deprecatory information is "profoundly humiliating." Charles Fried, *Privacy*, 77 YALE L.J. 475, 489 (1968). Thus, he sees the constitutional privilege as an "example of a contingent, symbolic recognition of an area of privacy as an expression of respect for personal integrity. . . ." *Id.* at 488.

⁶¹⁶ Two years after *Murphy*, Chief Justice Warren, writing for the majority in *Miranda v. Arizona*, 384 U.S. 436 (1966), perceived in the constitutional privilege the value of autonomy ("the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will'"), dignity (the privilege insists that the government respect "the dignity and integrity of its citizens"), and privacy (the "right to a private enclave where [one] may lead a private life"). *Id.* at 460. A year later, in *In re Gault*, 387 U.S. 1 (1967), Justice Fortas characterized the constitutional privilege as a manifestation of "the equality of the individual and the state," saw it as a device for preventing the state "from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction," and noted that the privilege is "related to the question of the safeguards necessary to insure that admissions or confessions are reasonably trustworthy". *Id.* at 47.

common law privilege, however, the concern for these values and interests is triggered only by official action.⁶¹⁷

Of the various objectives attributed to the privilege, only the reliability objective has been questioned by the Supreme Court. In *Tehan v. Shott*,⁶¹⁸ the Court said, "The basic purposes . . . do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.'" Saying that reliability is not "basic" to the privilege, however, is significantly different from saying that reliability is totally irrelevant. Thus, the Court's statement about the constitutional privilege is not inconsistent with our earlier analysis of the common law privilege under which the reliability value is contingent or secondary, rather than primary.⁶¹⁹ A similar analysis serves to explain the Court's more recent statement in *Allen v. Illinois* that the constitutional privilege "is not *designed* to enhance the reliability of the factfinding determination."⁶²⁰

More difficult to deal with is the Court's most recent statement in *Colorado v. Connelly*, that "[t]he sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion."⁶²¹ On its face, this statement implicitly denies that the constitutional privilege is concerned even secondarily with reliability. A closer look at the facts, however, suggests an alternative interpretation. As noted earlier,⁶²² Connelly was a schizophrenic who was commanded by the "voice of God" to confess or kill himself. After making incriminating statements on the street, he was taken to the police station

⁶¹⁷ *Id.* See *supra* text accompanying notes 463-64 (common law privilege) and note 556 (constitutional privilege).

⁶¹⁸ 382 U.S. 406, 415 (1966).

⁶¹⁹ See *supra* notes 462-63 and accompanying text. In assessing the quotation from *Tehan*, it is important to remember that the principal issue in *Tehan* was whether to give retroactive effect to *Griffin v. California*, 380 U.S. 609 (1965), which held that the Fifth Amendment prohibited comment on the defendant's failure to testify at trial. At the time *Tehan* was decided, the Supreme Court was more disposed to make a decision retroactive if it advanced the reliability of the fact-determining process. See Francis X. Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1559 (1975). The Court's statement in *Tehan* thus allowed it to lessen the disruptive effect of *Griffin* by denying retroactivity to it. See *id.* at 1563-64. It may also have permitted some Justices to vindicate their belief that *Griffin* was wrong. See *Desist v. United States*, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting); Beytagh, *supra* at 1563, 1572-73. The statement in *Tehan* should therefore be taken with several grains of salt.

⁶²⁰ *Allen v. Illinois*, 478 U.S. 364, 375 (1986) (emphasis added). The issue in *Allen* was whether standards of due process required recognition of the privilege if the person's compelled words could be used as a basis for involuntarily committing him as sexually dangerous.

⁶²¹ *Colorado v. Connelly*, 479 U.S. 157, 170 (1986) (emphasis added).

⁶²² See discussion *supra* at notes 592-93 and accompanying text.

where a detective gave the *Miranda* advice and obtained a purported waiver. Connelly then made additional incriminating statements. In arguing that the purported waiver was invalid, Connelly claimed that his mental illness made the waiver involuntary. The Court's response, that "[t]he sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion," should be read to mean only that governmental action is an essential trigger for Fifth Amendment analysis. It should not be read to mean that the constitutional privilege has no concern for reliability, even in cases in which there is governmental coercion. Thus, *Connelly*, in common with *Tehan* and *Allen*, should be read as saying no more than that the privilege has no free-standing concern for reliability, that is, a concern that is independent of governmental coercion.⁶²³ This, however, was also true of the common law privilege.

When we carefully consider the interpretation of the privilege by the Supreme Court, we find that the values and interests underlying it are identical to the foundational values and interests of the common law protection.

3. Objectives of the Due Process Rule⁶²⁴

Just as the Supreme Court has shaped the objectives of the constitutional privilege, so has it shaped the objectives of the due process rule. Lurking in the background of its decisions has been the common law protection, the purpose of which was to improve the accuracy of the guilt-determining process by excluding putatively unreliable confessions. In some respects, the due process cases have fallen short of this objective; in other respects, they have gone beyond it.

In more than forty cases since 1936, the Court has had to consider whether a confession was involuntary and why involuntary confessions should be

⁶²³ In his opinion for the Court in *Michigan v. Tucker*, 417 U.S. 433, 448 (1974), then-Justice Rehnquist, who also wrote *Connelly*, alluded without comment to the view that excluding unreliable confessions is one of the functions of the privilege.

⁶²⁴ For discussions that consider the subject in greater depth than is necessary in this Article, see 1 WAYNE R. LAFAYE AND JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 6.2 (1984); George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231 (1988); Joseph D. Grano, *Voluntariness, Free Will and the Law of Confessions*, 65 VA. L. REV. 859 (1979); Herman, *supra* note 601, at 749-52; Herman, *supra* note 537, at 452-56; Yale Kamisar, *What Is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728 (1963); Monrad G. Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411 (1954); Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865 (1981).

Taken as a whole, these discussions look closely at the objectives of the due process rule and find all of them problematic. By contrast, my concern in the present Article is simply to identify the objectives and compare them with the objectives of the constitutional privilege.

excluded. From these cases, five objectives have emerged, the prominence of each varying with the circumstances of the case.⁶²⁵ One of the objectives is reliability.⁶²⁶ Over the years, the Court has dealt inconsistently with this objective, sometimes embracing it, sometimes rejecting it.⁶²⁷ The best face that can be put on these cases is that reliability is a concern of the due process rule, but not the sole concern. The putative unreliability of a confession is a reason for excluding it,⁶²⁸ but even a demonstrably reliable confession may be excluded if it was obtained in derogation of other objectives.⁶²⁹

The other objectives that the Court has attributed to the due process rule are (1) to deter the police from engaging in conduct so offensive to the minimum standards of a civilized society that it shocks the conscience of the Court; (2) to deter the police from violating the law, even though the violation does not offend society's minimum standards; (3) to deter the police from using the techniques of an inquisitorial system and to encourage the use of accusatorial techniques; and (4) to deter the police from overbearing the suspect's will.⁶³⁰ The Court has not clearly delineated these objectives or inquired into the values that underlie them,⁶³¹ but all seem to be offshoots of a desire that government deal fairly with individuals. All seem to be premised on the notion that even those who are suspected of crime are entitled to treatment which minimally respects their dignity and their choice whether to expose their own guilt.⁶³² The same notion, of course, underlies both the common law and the constitutional privilege against compulsory self-incrimination.

⁶²⁵ "Thus a *complex of values* underlies the stricture against use by the state of confessions which, by way of convenient shorthand this Court terms involuntary, and the role played by each in any situation *varies* according to the particular circumstances of the case." *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960) (emphasis added).

⁶²⁶ See, e.g., *Jackson v. Denno*, 378 U.S. 368 (1964); *Blackburn v. Alabama*, 361 U.S. 199 (1960); *Spano v. New York*, 360 U.S. 315 (1959); see also *Dix*, *supra* note 624, at 263-69.

⁶²⁷ For thorough discussions, see 3 WIGMORE, *supra* note 80, § 822 and *Dix*, *supra* note 624, at 263-65.

⁶²⁸ This was so until *Colorado v. Connelly*, 479 U.S. 157 (1986). I assess the effect of *Connelly* *infra* at notes 634-38 and accompanying text.

⁶²⁹ This is the point of Professor Chadbourn's careful analysis in 3 WIGMORE, *supra* note 80, § 822, at 336 & n.22.

⁶³⁰ In setting out these objectives, I have freely plagiarized from myself. See Herman, *supra* note 601, at 749-50. For similar statements of the objectives of the due process rule, see sources cited in note 624, *supra*. Whether the due process rule has a free-standing concern for free will, i.e., a concern independent of police coercion or overreaching, is addressed *infra* in notes 634-36 and accompanying text. My statement in the text above anticipates the outcome of that discussion.

⁶³¹ See the sources cited in the two preceding footnotes.

⁶³² See *Dix*, *supra* note 624, at 269.

Until recently, the fact situations with which it dealt made it unnecessary for the Supreme Court to spell out the relationship between the reliability objective and the fair-play objectives. In the view of lower courts, however, the due process rule demanded inadmissibility whenever there was a substantial risk that a confession was unreliable, even if there was no official misconduct.⁶³³ Then, in *Colorado v. Connelly*,⁶³⁴ the Court confronted an unusual fact situation in which the arguable unreliability of the suspect's confession flowed not from official misconduct, but from the suspect's schizophrenia. In *Connelly*, the Court held that the due process rule is concerned only with unreliability caused by official coercion. Thus, the rule has no free-standing concern with unreliability. Even torture by private persons does not require inadmissibility. State legislatures and courts are at liberty to develop their own evidentiary rules to deal with unreliable confessions, but, absent governmental coercion, unreliability is not a due process concern.⁶³⁵

The due process rule, as shaped by *Connelly*, is the reverse of its common law antecedent. The common law rule, according to *Warickshall*, is concerned only with putatively unreliable confessions. Misconduct unrelated to unreliability is outside its scope. By contrast, the due process rule is concerned centrally with official misconduct. Unreliability is a secondary or contingent concern, invariably dependent upon the presence of official misconduct. Indeed, under *Connelly*'s version of the due process rule, *Warickshall*'s confession would have been admissible, for it was induced not by official action, but by the victim's promise not to prosecute.

⁶³³ See the state supreme court decision in *Connelly*, *People v. Connelly*, 702 P. 2d 722 (Colo. 1985). See also *Palmore v. State*, 12 So. 2d 854 (Ala. 1943) (private investigators and others); *People v. Haydel*, 524 P.2d 866 (Cal. 1974) (store security officer); *Lawton v. State*, 13 So. 2d 211 (Fla. 1943) (victim's lawyer); *Commonwealth v. Mahnke*, 335 N.E.2d 660 (Mass. 1975) (victim's family, neighbors, friends).

⁶³⁴ 479 U.S. 157 (1986).

⁶³⁵ See *id.* at 163-67. The Court took the same line with reference to the due process rule's free-will objective. According to the Court, the rule is concerned with impairment of free will only if caused or exploited by governmental coercion. See *id.* Similarly, the Court said that the constitutional privilege has no free-standing concern for free will. See *id.* at 169-70. For a thorough discussion of *Connelly*'s treatment of free will, see Dix, *supra* note 596, at 288-313. It had been assumed prior to *Connelly* that a confession was inadmissible under the due process rule for want of free will whether or not there was governmental coercion or overreaching. *Id.* at 289-90; *United States v. Raymer*, 876 F.2d 383 (5th Cir. 1989).

4. Objectives Compared

In his opinion for the Court in *Allen v. Illinois*,⁶³⁶ then-Justice Rehnquist said that the constitutional privilege against compulsory self-incrimination "stands in the Constitution for [reasons] entirely independent [of reliability]." ⁶³⁷ In support of the statement, he cited *Rogers v. Richmond*,⁶³⁸ a case which was decided not under the constitutional privilege, but under the due process rule. In *Rogers*, which was a product of the period in which the Court was dealing inconsistently with the reliability objective of the due process rule, Justice Frankfurter said that involuntary confessions were excluded "not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system. . . ." ⁶³⁹ Had *Allen* been decided six months later, Justice Rehnquist could have cited his own opinion in *Connelly*. *Connelly* deals with both the constitutional privilege and the due process rule and treats them in the same way. Under each, a concern for reliability is secondary. Under each, the primary concern is inquisitorial, official action that fundamentally flouts the sovereignty of the individual and its underlying values of autonomy, dignity, and privacy. As a result of *Connelly* and other cases, the objectives of the two constitutional protections are considerably more alike than were the objectives of their common law antecedents. Indeed, it is hard to find any difference between the objectives of the constitutional protections.

E. The Lessons of Constitutionalization and Interpretation

1. Introduction

Measured by the criteria of history, operations, and objectives, the *common law* privilege and the *common law* confession rule were, as we earlier saw, remarkably similar, although we found a small area within which the confession rule functioned uniquely. Measured by the same criteria, the two *constitutional* protections, as interpreted by the Supreme Court, are at least as similar. As a matter of history, the constitutional protections derive from substantially overlapping common law analogues, and a strong aversion to torture is in the immediate background of each. Both constitutional protections operate in similar fashion. Indeed, after *Connelly*, they operate more alike than did their common law antecedents. The only operational differences are that

⁶³⁶ 478 U.S. 364 (1986).

⁶³⁷ *Id.* at 375 (bracketed material added).

⁶³⁸ 365 U.S. 534 (1961).

⁶³⁹ *Id.* at 540-41.

balancing is impermissible when the privilege is asserted in ordinary criminal proceedings, that due process analysis sometimes requires a consideration of the "totality of the circumstances," and that the exclusion of evidence is the primary role of the due process rule but only the secondary role of the privilege. Also as a result of *Connelly*, both constitutional protections have the identical objectives of protecting autonomy, dignity, and privacy from official overreaching.

Even when *Malloy* was decided in 1964, the two constitutional protections were remarkably similar. Thus, there may have been a nudge or a shove, but there was no "shotgun wedding" when Justice Brennan cited the due process cases as evidence that the Court had been applying the constitutional privilege to state criminal proceedings all along.⁶⁴⁰ Shotgun or no, however, the result of *Connelly* is that the marriage partners voluntarily repeated their vows one year short of their silver anniversary, for *Connelly* makes the two constitutional protections almost identical.

2. A Question of Preference

If we have almost identical protections, should we use both or only one in resolving cases? If only one, which one? In his dissenting opinion in *Miranda*, Justice Harlan acknowledged that the two constitutional protections serve similar values, but urged that the Court continue to apply the due process rule in preference to the privilege: "Since extension of the general principle has already occurred [in the due process cases], to insist that the privilege applies as such serves only to carry over inapposite historical details and engaging rhetoric and to obscure the policy choices to be made in regulating confessions."⁶⁴¹ In *Connelly*, Chief Justice Rehnquist noted that in cases outside *Miranda*, "[t]he Court has retained [a] due process focus, even after

⁶⁴⁰ One must also acknowledge the prescience of Professor John Spanogle, who in the same year argued that the due process cases made sense only if read as embodying the values of the privilege against compulsory self-incrimination. John A. Spanogle, *The Use of Coerced Confessions in State Courts*, 17 VAND. L. REV. 421, 434-35 (1964).

⁶⁴¹ *Miranda v. Arizona*, 384 U.S. 436, 511 (1966) (Harlan, J., dissenting).

The Court's rejection of Justice Harlan's position and its use of the Fifth Amendment in *Miranda* in preference to the due process rule do not moot the questions raised in the text. *Miranda* is inapplicable to police interrogation if the suspect is not in custody. See *Berkemer v. McCarty*, 468 U.S. 420 (1984) (ordinary traffic stop is not custodial and thus does not trigger *Miranda*). In such a case, a court must decide whether the standard for determining the admissibility of a confession is provided by the privilege or by the due process rule. The same is also true when a suspect, who has waived protection under *Miranda*, confesses and then claims that his confession resulted from impermissible interrogation tactics. See *Miller v. Fenton*, 474 U.S. 104 (1985). Of course, the same question would apply to all confessions should *Miranda* be overruled.

holding, in *Malloy v. Hogan*, that the Fifth Amendment privilege against compulsory self-incrimination applies to the States.⁶⁴² As a matter of recent historical fact, the Chief Justice is right,⁶⁴³ but why should the due process rule be preferred to the privilege as the constitutional test for admissibility? After all, the only explicit constitutional protection against compelled self-incrimination is the Fifth Amendment's privilege. The Due Process Clause says nothing about the subject.⁶⁴⁴ It is a judicial construct that originated only as a result of the fact that the privilege was not applicable to state proceedings until 1964. Had the Court not constructed a due process restriction on police interrogation, confessions extorted by police brutality would have been beyond federal constitutional reach. Assuming that the privilege applies to confessions obtained by the police—a matter that I shall discuss later—it is quite likely that, if the privilege had been applicable to state proceedings in 1936, it, and not the Due Process Clause, would have been used to make the confession inadmissible in the first state coerced confession case to reach the Court—*Brown v. Mississippi*.⁶⁴⁵ In other situations, a specific constitutional provision would certainly be applied in preference to a general one.⁶⁴⁶ Particularly in view of the fact that *Connelly* has stripped the due process protection of its unique characteristics, there is no longer any point in applying the due process protection.⁶⁴⁷

⁶⁴² *Colorado v. Connelly*, 479 U.S. 157, 163 (1986).

⁶⁴³ See *Beecher v. Alabama*, 389 U.S. 35 (1967).

⁶⁴⁴ "The 'voluntariness' test and its accompanying baggage is as much a 'judge-made' or 'judicially created' doctrine as is the search and seizure exclusionary rule." Kamisar, *Reply*, *supra* note 605, at 547.

⁶⁴⁵ 297 U.S. 278 (1936).

⁶⁴⁶ An analogy may be drawn to the Sixth Amendment's right to counsel. Before that right was incorporated into the Fourteenth Amendment and made applicable to the states, the Court used the Due Process Clause. It held that fundamental fairness required the timely appointment of counsel for the indigent in capital cases, see *Powell v. Alabama*, 287 U.S. 45 (1932), and in some noncapital cases. See *Betts v. Brady*, 316 U.S. 455 (1942). After the Sixth Amendment was made applicable to state cases in *Gideon v. Wainwright*, 372 U.S. 335 (1963), however, the Court did not continue to use the Due Process Clause in preference to the Sixth Amendment. See generally Lawrence Herman & Charles A. Thompson, *Scott v. Illinois and the Right to Counsel: A Decision in Search of a Doctrine?*, 17 AM. CRIM. L. REV. 71 (1979).

⁶⁴⁷ Lest I be misunderstood, I hasten to add that I do not necessarily agree with *Connelly*'s interpretation of the due process protection. *Connelly* has been roundly criticized. See Lawrence A. Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U.L.Q. 59 (1989); Dix, *supra* note 596; Kamisar, *Reply*, *supra* note 605, at 547 n.40; Noel Moran, Comment, *Confessions Compelled by Mental Illness: What's an Insane Person To Do?* *Colorado v. Connelly*, 107 S.Ct. 515 (1986), 56 U. CIN. L. REV. 1049 (1988); Scott A. McCrerght, Comment, *Colorado v. Connelly: Due Process Challenges to Confessions and Evidentiary*

3. *The Persistence of the Due Process Rule*

Why, then, did Chief Justice Rehnquist point out in *Connelly* that “[t]he Court has retained [a] due process focus” in the post-*Malloy* world?⁶⁴⁸ One cannot know the answer to a certainty, but a plausible explanation is that the Chief Justice perceives due process as a significantly less stringent limitation on police interrogation because it permits balancing in the ordinary criminal context. In the resolution of due process issues, including confessions, the Court has engaged in a balancing of interests, including the societal interest in police questioning.⁶⁴⁹ Although the Court has also engaged in a balancing of interests in resolving some self-incrimination issues,⁶⁵⁰ it never uses balancing to justify compulsory self-incrimination without immunity in the ordinary criminal process, which is the “primary context from which the privilege emerges.”⁶⁵¹ Avoiding this position may have been the point of Chief Justice Rehnquist’s remark.

Reliability Interests, 73 IOWA L. REV. 207 (1987). In a private conversation, Professor Yale Kamisar suggested to me that the outcome in *Brown v. Mississippi* would have been the same if the confession had been obtained by the torturous acts of the Ku Klux Klan. In that event, the Court would probably have found state action in Mississippi’s use of the confession. Justice Brennan has proffered the reasonable argument that a confession is presumptively unreliable if made by a person who has a serious mental illness, and that due process bars the admissibility of the confession until the prosecution overcomes the presumption by “evidence extrinsic to the confession itself.” *Colorado v. Connelly*, 479 U.S. 157, 183 (1986) (Brennan, J., dissenting). But the present question is not whether *Connelly* is right. It is whether, given *Connelly*, there is any point in preferring the due process rule to the privilege as the constitutional test for admissibility.

Moreover, the question of preference would remain even if *Connelly* had been decided differently. If *Connelly* had conferred on the due process rule the objectives and scope of the common law confession rule, thus giving the due process rule a function not also served by the privilege, the two constitutional protections would still overlap significantly. They would still have the same general values, with the reliability value primary in the due process rule but only secondary in the privilege. Most cases of police interrogation, however, would fall within the area of overlap, and in those cases the question would remain whether there is any reason to prefer the due process rule to the privilege.

⁶⁴⁸ 479 U.S. at 163.

⁶⁴⁹ See *supra* note 603 and accompanying text, citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

⁶⁵⁰ See *supra* notes 574–83 and accompanying text.

⁶⁵¹ *California v. Byers*, 402 U.S. 424, 440 (Harlan, J., concurring). As noted *supra* notes 567–68 and accompanying text, *New Jersey v. Portash* flatly rejected balancing in a case in which the state wanted to use compelled, immunized testimony to impeach the defendant in a subsequent trial. In the Court’s most recent case, *Baltimore City Dep’t of Social Services v. Bouknight*, 493 U.S. 549 (1990), discussed *supra* at notes 579–86 and accompanying text, the Court, although not resolving the question of use, cited *Portash* and

A closely-related explanation for the Chief Justice's preference is that the very generality of the Due Process Clause may permit the Court to establish a higher threshold for finding a violation than it has set under the privilege. The tone of the present Court's due process decisions is exemplified by *Moran v. Burbine*,⁶⁵² a case in which a police officer told the suspect's lawyer that there would be no interrogation even though he knew that interrogation was about to begin. In support of his motion to suppress, the suspect argued that the officer's conduct violated due process. This argument found favor with three dissenting justices who posited a spacious due process test of "fairness, integrity, and honor in the operation of the criminal justice system"⁶⁵³ The majority, however, rejected the argument, adopting a much narrower test—whether "the challenged conduct . . . so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States."⁶⁵⁴ The Court recently put a finer point on the matter when it admonished in *Dowling v. United States* that "[b]eyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation."⁶⁵⁵ It explained the narrow role by quoting from an earlier decision:

Judges are not free in defining 'due process' to impose on law enforcement officials [their] 'personal and private notions' of fairness and to 'disregard the limits that bind judges in their judicial function.' *Rochin v. California*, 342 U.S. 165, 170 (1952). . . . [They] are to determine only whether the action complained of violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), and which define 'the community's sense of fair play and decency,' *Rochin v. California*, *supra*, at 173.⁶⁵⁶

These passages may shed some light on the following statement from *Connelly*:

Indeed, coercive governmental misconduct was the catalyst for this Court's seminal confession case, *Brown v. Mississippi*, 297 U.S. 278 (1936). In that case, police officers extracted confessions from the accused through brutal torture. The Court had little difficulty concluding that even though the Fifth Amendment did not at the time apply to the States, the actions of the police were "revolting to the sense of justice." *Id.*, at 286. The Court has retained *this* due process focus, even after holding, in *Malloy v. Hogan*, 378

strongly suggested that it was impermissible to use the evidentiary fruit of compelled production on the criminal enforcement side of an essentially civil regulatory scheme.

⁶⁵² 475 U.S. 412 (1986).

⁶⁵³ *Id.* at 467 (Stevens, J., dissenting, joined by Justices Brennan and Marshall).

⁶⁵⁴ *Id.* at 433-34.

⁶⁵⁵ *Dowling v. United States*, 493 U.S. 342, 353 (1990).

⁶⁵⁶ *Id.* (quoting from *United States v. Lovasco*, 431 U.S. 783, 790 (1977)) (brackets and omissions in original).

U.S. 1 (1964), that the Fifth Amendment privilege against compulsory self-incrimination applies to the States.⁶⁵⁷

The referent of the italicized word “this” is not clear. It may be merely any quantum of coercive state action, thus implying a broad definition of due process, or it may be only state action that falls so far below civilized standards that all judges would find it “revolting to the sense of justice,” a very narrow definition of due process. One cannot tell from *Connelly* which alternative the Court had in mind, but *Moran* and *Dowling* point in the direction of the latter. Therefore, it seems plausible to read the Chief Justice’s statement as insisting that a confession should be inadmissible under the due process test only if the police obtained it by conduct so egregious as to shock the conscience of the court.⁶⁵⁸

⁶⁵⁷ 479 U.S. 157, 163 (1986) (emphasis added).

⁶⁵⁸ Early in his judicial career, then-Justice Rehnquist, writing for the Court in *Michigan v. Tucker*, 417 U.S. 433 (1974), described the due process standard as involving a determination of “whether the processes were so unfair and unreasonable as to render a subsequent confession involuntary.” *Id.* at 441. Then, from approximately forty involuntary confession cases, he selected three against which to measure the facts of *Tucker*—*Brown v. Mississippi*, 297 U.S. 278 (1936); *Watts v. Indiana*, 338 U.S. 49 (1949); and *Gallegos v. Colorado*, 370 U.S. 49 (1962). *Tucker*, 417 U.S. at 448–49. *Brown* involved torture. In *Watts*, the suspect was interrogated on five of the six days he was held. The interrogations, by relays of police officers, often went into early morning hours. The suspect was deprived of sleep and food and was kept in solitary confinement in “the hole” for a part of the period. 338 U.S. at 53. In *Gallegos*, the suspect, who was 14 years old, was held incommunicado for five days in “security” in a juvenile detention facility. 370 U.S. at 50. The selection of these cases as a baseline suggests a narrow view of the due process protection—a view that accords considerable latitude to the police to apply pressure to a suspect as long as the police stop short of flagrant or outrageous action.

The narrow view of due process is a throwback to an earlier generation of confession cases in which the Court held confessions to be voluntary despite the presence of substantial pressure on the suspect including force and the threat of force. *See Herman, supra* note 537, at 456 nn.36–39 (collecting cases). It is incompatible with later cases such as *Haynes v. Washington*, 373 U.S. 503 (1963) (confession held involuntary principally on ground that suspect had been prohibited from calling his wife until he confessed). Chief Justice Rehnquist’s narrow view of the due process test is best illustrated by his opinion in *Mincey v. Arizona*, 437 U.S. 385, 407–10 (1978). The suspect, who had been shot, was interrogated in an intensive care room over a period of three to four hours. He was in pain and encumbered by medical apparatus. His repeated requests for a lawyer were ignored. Eight justices agreed that *Mincey*’s confession was involuntary and therefore inadmissible to impeach his trial testimony. Only Justice Rehnquist concluded that the trial court was entitled to find the confession voluntary.

Although Justice Rehnquist’s view did not prevail in *Mincey*, it is reflected where it counts most—in the decisions of lower courts, almost all of which escape Supreme Court review. *See, e.g., Illinois v. House*, 566 N.E.2d 259 (Ill. 1990) (confession voluntary even

This narrow due process test stands in contrast to the broader protection afforded by the privilege. Although the privilege's key word—"compelled"—is imprecise, the Supreme Court has never held that a confession is compelled only if induced by shocking misconduct (or, to take another major theme of the due process rule, only by breaking the suspect's will). To the contrary, the Court has explicitly and implicitly rejected these positions. In *Malloy v. Hogan*, the Court said, "Under [the privilege], the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was 'free and voluntary,'"⁶⁵⁹ and in a host of other cases, the Court has found compulsion even though the governmental conduct was neither shocking nor will-breaking.⁶⁶⁰ Thus, although the Fifth

though suspect was held in windowless, starkly furnished room for 49 hours, gave his first inculpatory statement after 25 hours, and his first confession after 37 hours; suspect had been fed, allowed to use the bathroom three times, allowed to make one telephone call, and allowed to sleep on a table); *Light v. Indiana*, 547 N.E.2d 1073, 1079 (Ind. 1989) (confession voluntary even though suspect was interrogated for four hours, one interrogator repeatedly feigned great anger with the suspect, and officer gave suspect's arm a "mild smack or tap" fifteen times "to keep him alert"); see also the cases and other authorities collected in Herman, *supra* note 601, at 752-54.

⁶⁵⁹ *Malloy v. Hogan*, 378 U.S. 1, 7 (1964) (quoting *Bram v. United States*, 168 U.S. 532, 542 (1897)).

⁶⁶⁰ The cases are the very ones in which the Court refused to engage in balancing. See *Lefkowitz v. Cunningham*, 431 U.S. 801, 805-08 (1977) (forfeiture of non-paid political party office is compulsion); *Lefkowitz v. Turley*, 414 U.S. 70, 82-84 (1973) (forfeiture of government contracts is compulsion); *Gardner v. Broderick*, 392 U.S. 273, 279 (1968) (loss of public employment is compulsion); *Spevack v. Klein*, 385 U.S. 511, 516 (1967) (disbarment is compulsion); *Garrity v. New Jersey*, 385 U.S. 493 (1967) (loss of public employment is compulsion). In none of these cases could the pressure be described as shocking. In all of the cases except *Garrity*, the witness refused to answer and was subjected to a sanction. That the witness refused to answer demonstrates that the pressure was not will-breaking.

In addition to the cases cited in this note, see *Miranda v. Arizona*, 384 U.S. 436, 457 (1966), in which the Court held that confessions were the product of inherent compulsion in violation of the privilege even though "we might not find [them] to have been involuntary in traditional terms." See also *Edwards v. Arizona*, 451 U.S. 477, 488 (1981) (Burger, Ch.J., concurring) (suspect's purported *Miranda* waiver was made involuntary by jailer's statement that suspect had to talk to police); *Escobedo v. Illinois*, 378 U.S. at 499 (White, J., dissenting) (suggesting that answers are compelled if suspect is told he must answer). It is also instructive to consult cases involving, or resulting from, legislative inquiries. See, e.g., *United States v. North*, 910 F.2d 843, modified, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 114 L. Ed. 2d 477 (1991). The legislative inquiry cases have shaped our perception of how the privilege operates. When we watch a televised inquiry, we expect that the witness will be advised by counsel; that the interrogator will honor the assertion of the privilege by taking "no" for an answer and not pressing the same question; that questioning will cease when it becomes apparent that the witness will refuse to answer all questions calling for self-incriminating answers; and that, if the need for information is great enough,

Amendment's test is unclear, it is undeniably broader or more protective than the due process test suggested by *Connelly*.⁶⁶¹ The *Connelly* test is so narrow

the interrogator will offer immunity. We thus expect a protective privilege. We would be greatly surprised and perhaps offended if the interrogator continued to press the same question or remonstrate with the witness for asserting the privilege, as occurred during the "Army-McCarthy Hearings." See THOMAS C. REEVES, *THE LIFE AND TIMES OF JOE MCCARTHY* 522 (1982). We would be even more surprised and offended if the interrogator came close to using the sort of tactics that lower courts have upheld under the due process rule. See authorities cited in note 658, *supra*.

It would therefore be inconsistent with both interpretation and perception to constrict the constitutional privilege by looking only to the historical conditions that gave rise to the common law protection. Justice Rehnquist, however, has tried to do precisely that. In his opinion in *Michigan v. Tucker*, he said, "The importance of a right does not, by itself, determine its scope, and therefore we must continue to hark back to the historical origins of the privilege, particularly the evils at which it was to strike." 417 U.S. at 439-40. Subsequently, he said, "A comparison of the facts in this case with the historical circumstances underlying the privilege against compulsory self-incrimination strongly indicates that the police conduct here did not deprive respondent of his privilege against compulsory self-incrimination as such. . . ." 417 U.S. at 444. See also *New York v. Quarles*, 467 U.S. 649, 654 (1984), in which Justice Rehnquist's opinion may be read to equate Fifth Amendment compulsion with due process involuntariness. In neither of these opinions did Justice Rehnquist discuss the cases cited above.

⁶⁶¹ There has been a lively and interesting debate in the literature over whether "compelled," in the Fifth Amendment sense, is more protective than "involuntary," in the due process sense. For the view that it is, see Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 440-46 (1987). For the view that it is not, see Joseph D. Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 182 (1988). Professor Schulhofer's position rests on many of the cases cited in note 660, *supra*. Professor Grano's position is complex and problematic. He denies that the due process test is limited to will-breaking situations, but he fails to say what more it includes. *Id.* at 182. He asserts that "the task, whether viewed in terms of Fifth Amendment compulsion or due process voluntariness is 'to sift out *undue* pressure, not to assure spontaneous confessions,'" *id.* at 183 (quoting Justice Harlan's dissenting opinion in *Miranda v. Arizona*, 384 U.S. 436, 515 (1966)), but he does not discuss whether the standards for determining what is "undue pressure" are the same in both contexts. Finally, he reads the public employment cases cited in note 660, *supra*, not as prohibiting even "mild pressures," *id.* at 183, but for the proposition "that the Fifth Amendment precludes the state from asserting a claim of right to the defendant's testimony." *Id.* He fails to consider, however, the implications of his own position with reference to police interrogation. If the police do not have a claim of right to the suspect's confession, what do they have? If they have no claim of right, what are they doing when they arrest a suspect, detain him at the police station, and subject him to "mild pressures" or worse in order to obtain a confession? If they have no claim of right, do they have to take "no" for an answer, or may they persist? All of these questions lead ineluctably to a question of overarching significance: is custodial interrogation incompatible with the police having no claim of right to the suspect's confession?

Although these questions are important and provocative, I do not intend to pursue them in depth in this Article because they are collateral to my present thesis. My thesis is that in delineating the constitutional standards for determining the admissibility of confessions obtained by governmental action, the Court should prefer a textually relevant constitutional provision (the Fifth Amendment privilege) to one that is textually neutral at best (the Due Process Clause). Which of the two is more protective is not a matter of fundamental concern to me at the present time. Even if the textually relevant provision were no more protective, it would make sense to apply it. I raised the issue of which provision is more protective only as part of a speculation about why *Connelly* seems to express a preference for the textually neutral provision.

I realize, however, that the reader may be moved to reply, "If the privilege is no more protective than the due process rule, why should courts worry about which doctrine to use?" To head off that understandable reaction, I want to align myself with Professor Schulhofer. In addition to what I have already said in the text and other footnotes, I believe that a consideration of a few fact situations will demonstrate that the privilege is more protective than the due process rule. The presence of *Miranda* has generally made it unnecessary for the Supreme Court in recent years to examine the voluntariness of confessions. (*Connelly* is, of course, an exception.) Consequently, in order to compare the protectiveness of doctrines, one must assume either a case to which *Miranda* does not apply or that *Miranda* does not exist. I shall assume the latter—that there is no requirement of advice and waiver, but that the privilege is applicable to police interrogation. In light of this assumption, I now consider several different scenarios.

Scenario # 1. Police arrest a suspect (*S*) and put him in a cell. An hour later, a jailer arrives at the cell to take *S* to an interrogation room. *S* says, "I do not want to talk to the police." The jailer says, "You have to." *S* confesses after a relatively brief interrogation. This fact situation is drawn from facets of both *Edwards v. Arizona*, 451 U.S. 477 (1981), and the recent case of *Minnick v. Mississippi*, 111 S. Ct. 486 (1990). Under a due process approach, the jailer's statement is but one of the totality of circumstances. A court would not be required to suppress solely because of it. See *supra* note 601 and accompanying text. Under the privilege, however, the jailer's statement is an impermissible claim of right to *S*'s self-incriminating information. See *Escobedo v. Illinois*, 378 U.S. 478, 499 (1964) (White, J., dissenting); Grano, *supra*.

Scenario # 2. Police arrest *S* and take him to the station for interrogation. *S* says, "I do not want to talk to you. I want to talk to a lawyer." The officer ignores *S*'s statement and persists in interrogating *S*. *S* eventually confesses. This scenario combines the facts of *Michigan v. Mosley*, 423 U.S. 96 (1975) (suspect invoked privilege), and *Edwards v. Arizona*, 451 U.S. 477 (1981) (suspect invoked right to counsel). Under the due process rule, a court would consider *S*'s expressed wishes and the officer's persistence, but would not have to give controlling effect to them. See, e.g., *Crooker v. California*, 357 U.S. 433 (1957) (denial of suspect's request for counsel did not make confession inadmissible). Under the privilege, however, the officer has to take "no" for an answer, just as an interrogator would at a legislative inquiry. See *supra* note 660 and accompanying text.

Scenario # 3. Police arrest *S* and take him to the station for interrogation. *S* refuses to answer questions until he is allowed to call his wife, but the police refuse to let him call until he makes a statement and cooperates. They interrogate *S* and he confesses. This scenario is an abbreviated version of *Haynes v. Washington*, 373 U.S. 503 (1963). Although a bare majority of the Court held *Haynes*' confession inadmissible under the due process rule, I

that it will exclude few confessions, and that is apparently what some of the Justices want.⁶⁶²

There may be a third reason for Chief Justice Rehnquist's preferring the due process approach—a tactical reason. Because balancing has long been a part of due process analysis, it is unexceptional and taken for granted. Taking it for granted entails two risks: that those who strike the balance will do so either carelessly or with their thumb on the scale, and that those who observe the balancing either will give it less scrutiny or will accept the results with silent resignation. The second risk increases the first. In the context of the privilege, however, balancing is extraordinary. Consequently, when a court engages in self-incrimination balancing, even in connection with non-criminal, regulatory schemes, as in *Byers* or *Bouknight*, it strikes a jarring note. The note is jarring precisely because the Court seems to be creating an exception to an explicit stricture against compulsory self-incrimination. That the note is jarring makes it more likely that we will scrutinize and complain about the results. This, in turn, may make it harder for those who strike the balance to put their thumb on the scale. Another way of stating the same point is that due process balancing is more likely to be of low visibility, and self-incrimination balancing is more likely to be of high visibility. The Chief Justice's preference for the due process rule may thus also evince a preference for the tactically advantageous position of low-visibility balancing, a position that will enable the Court to insure the admissibility of most confessions.⁶⁶³

have no doubt that today's Supreme Court and virtually all lower courts would say that Haynes' confession was voluntary. Under the privilege, however, the officer's refusal to let Haynes call his wife until he confessed is a claim of right to Haynes' incriminating statement as well as a refusal to take "no" for an answer.

As the privilege and the due process rule have developed in American law, it *does* make a difference whether one uses the privilege or the due process rule to determine the admissibility of the suspect's statement. Although the Court has the authority to reinterpret the privilege so that it gives no more protection than the due process rule—a position that Justice Harlan urged in his *Garrity* and *Miranda* dissents—it would have to ignore or overrule the large body of case law on which Professor Schulhofer relies. It would also have to explain the irony, which antedated *Miranda*, that a counselled witness at a televised legislative hearing into matters of national significance was given more protection than a suspect isolated with an interrogator at the police station.

⁶⁶² I am not saying, and I do not believe, that every member of the *Connelly* majority subscribes to the views of the Chief Justice. For example, although Justice Stevens agreed that the use of a confession does not offend due process in the absence of some coercion, he is on record as supporting a due process test that is broader than "shocks the conscience." See *Moran v. Burbine*, 475 U.S. 412, 439–43 (1986). I do believe, however, that the Chief Justice has planted a seed which he and some others may want to harvest at a later time.

⁶⁶³ In connection with the point made in the text, one would do well to remember that the due process rule also impairs the effectiveness of judicial review. "The ambiguity of the due process test and its subtle mixture of factual and legal elements discouraged active

At bottom, all three explanations reflect what is surely no secret—that a majority of the Court is hostile to exclusionary rules. Indeed, its hostility is several times manifested in *Connelly*.⁶⁶⁴ Although hostility to the exclusion of confessions may explain the Court's preference for a due process test, it will not justify it. As I have already pointed out, the Fifth Amendment explicitly prohibits governmental action that results in compelled self-incrimination and is therefore textually relevant to interrogation. The Due Process Clause, however, makes no explicit reference to self-incrimination and is therefore textually irrelevant or neutral to interrogation. *Connelly*'s suggested preference for a textually irrelevant or neutral provision rests on no legitimate principle of documentary interpretation. It is nothing more than result-oriented, social engineering which is intended to insure that more rather than fewer confessions will be admitted into evidence.

The Supreme Court has never squarely addressed the question of whether the Due Process Clause should be preferred to the Fifth Amendment as a test for determining the admissibility of confessions in cases falling outside the scope of *Miranda*. *Beecher v. Alabama*⁶⁶⁵ is as close as the Court has come.⁶⁶⁶ In *Beecher*, five justices held that a confession was inadmissible under the due process test even though four concurring justices insisted that the Fifth Amendment's compulsion test should be applied. The majority, however, never addressed the question of preference, and its holding can hardly be taken as a resolution of the issue. The time has now come for the Court to address the issue squarely. There was a time when the due process test served unique purposes, but *Connelly* has seemingly put an end to that. Consequently, the time has also come for the Court to express its preference for the Fifth Amendment's compulsion standard as the exclusive federal constitutional test for determining the admissibility of a confession obtained by governmental pressure.

Taking *Connelly* at face value, the only conceivable argument in favor of retaining a due process test is that the Fifth Amendment's privilege is not applicable to police interrogation. To that argument I now turn.

review even by the most conscientious appellate judges." Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 870 (1981). See also Herman, *supra* note 601, at 752. By "subtle mixture of factual and legal elements," Professor Schulhofer is referring not only to balancing but also to the fact that the due process rule sometimes requires a court to consider the "totality of the circumstances." See *supra* notes 601-02 and accompanying text.

⁶⁶⁴ See 479 U.S. 157, 166 (1986).

⁶⁶⁵ 389 U.S. 35 (1967).

⁶⁶⁶ The Court did not resolve the issue in *Connelly*. In *Connelly*, the defendant took the due process rule at face value and argued that his confession was inadmissible under it. Consequently, there was no need for the Court to resolve the question of preference, and Chief Justice Rehnquist's statement is dictum.

V. COMPULSORY SELF-INCRIMINATION AND POLICE INTERROGATION

A. Introduction

Some who argue that the privilege and the involuntary confession rule are wholly separate and fundamentally different rely on the claim that only the confession rule is applicable to police interrogation. Wigmore is the prime example.⁶⁶⁷ In my earlier discussion of Wigmore's operational arguments, I deferred this point. The time is now ripe to consider it.

Although intimations of it survive,⁶⁶⁸ Wigmore's position has been disavowed or ignored by most commentators.⁶⁶⁹ Of greater practical importance, it has been contradicted by the Supreme Court. In *Bram v. United States*,⁶⁷⁰ the Court applied the privilege to hold inadmissible a confession obtained by a Nova Scotian detective.⁶⁷¹ After *Bram*, however, the Court did

⁶⁶⁷ 8 WIGMORE, *supra* note 3, § 2252, at 328-29; *see also* 8 WIGMORE, *supra* note 3, § 2266, at 401 ("The privilege covers only disclosures made under legal compulsion.").

⁶⁶⁸ *See* Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1446, 1468, 1473-74 (1985); Joseph D. Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 4, 36 (1979); Joseph D. Grano, *Voluntariness, Free Will and the Law of Confessions*, 65 VA. L. REV. 859, 927 (1979).

⁶⁶⁹ *See, e.g.*, JOHN MACARTHUR MAGUIRE, EVIDENCE, COMMON SENSE AND COMMON LAW 82, 105, 121 (1947); CHARLES MCCORMICK, EVIDENCE 154-57 (1954); EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 129-31 (1954); Kamisar, *Dissent*, *supra* note 5, at 65-76; Kamisar, *Equal Justice*, *supra* note 5, at 25-32; Paul G. Kauper, *Judicial Examinations of the Accused: A Remedy for the Third Degree*, 30 MICH. L. REV. 1224, 1251 (1932); Roger J. Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U. CHI. L. REV. 657, 674 (1966).

MODEL CODE OF EVIDENCE Rule 203 (1942) states, "Subject to [certain rules], every natural person has a privilege, which he may claim to refuse to disclose in an action or to a public official of this State or any governmental agency or division thereof any matter that will incriminate him" (emphasis added).

The commentary to Rule 203 observes that the privilege "is applicable not only to proceedings in court but also to all inquiries by representatives of the government." *Id.* at 134. That the drafters of the *Model Code* intended to include police interrogation is apparent from illustration 2 in the commentary: "While investigating a homicide of A, who was found dead in a small room, the police ask W whether he was present in the room at the time of the killing. W is entitled to refuse to answer on the ground of self-incrimination." *Id.* To the same effect, *see* UNIFORM RULES OF EVIDENCE Rule 25 (1953). The drafters of the 1974 revision did not codify the privilege against compulsory self-incrimination and thus omitted this provision from their work.

⁶⁷⁰ 168 U.S. 532 (1897).

⁶⁷¹ *Id.* at 542-45. Although three justices dissented, none objected to applying the privilege to police interrogation. *See id.* at 569-73.

not rely on the privilege, and it fell into disuse as a restriction on police interrogation. In the 1950's and early 1960's, the applicability of the privilege was still debated in the cases.⁶⁷² The beginning of the end of the case-law debate occurred in 1964 when the Court held in *Malloy v. Hogan*⁶⁷³ that the privilege applied to state proceedings. En route to this holding, it implied that the privilege governed police interrogation.⁶⁷⁴ Later the same year, in *Escobedo v. Illinois*,⁶⁷⁵ the implication became stronger when the Court noted that the police tried to "get" the suspect to confess "despite his constitutional right not to do so,"⁶⁷⁶ and without warning him of his "absolute [constitutional] right to remain silent."⁶⁷⁷ Two years later, the Court dropped the other shoe by explicitly holding in *Miranda* that the privilege applied to police interrogation.⁶⁷⁸ This holding drew fire from dissenting Justices Harlan and White who, relying on Wigmore, insisted that the privilege was historically inapplicable to confessions obtained by interrogators who lacked the contempt power to compel answers.⁶⁷⁹

If *Malloy* was the beginning of the end of the case-law debate, *Miranda* seemed to be the end of the end. Although *Miranda* remained controversial, the contested issue was not the propriety of making the privilege apply to police interrogation,⁶⁸⁰ and, in the years after *Miranda*, the Court often described the

⁶⁷² Compare the majority opinion in *Stein v. New York*, 346 U.S. 156, 190-91 n.35 (1953) (relying on Wigmore and disparaging *Bram*) with *id.* at 197-98 (Black, J., dissenting) (supporting *Bram*) and *id.* at 208 (Douglas, J., dissenting) (same) and *Culombe v. Connecticut*, 367 U.S. 568, 583 n.25 (1961) (same) (by implication) and *Leyra v. Denno*, 347 U.S. 556, 558 n.3 (1954) (same) and *Rochin v. California*, 342 U.S. 165, 174 (1952) (Black, J., concurring) (same) and *id.* at 179 (Douglas, J., concurring) (same).

⁶⁷³ 378 U.S. 1 (1964).

⁶⁷⁴ *Id.* at 6 (stating that Court's involuntary confession rule cases, which involved police interrogation, were in fact applications of the privilege).

⁶⁷⁵ 378 U.S. 478 (1964).

⁶⁷⁶ *Id.* at 485.

⁶⁷⁷ *Id.*

⁶⁷⁸ 384 U.S. 436, 467 (1966).

⁶⁷⁹ 384 U.S. at 510-11 (Harlan, J., dissenting); *id.* at 526-28 (White, J., dissenting). Only two years earlier, however, Justice White had complained in his *Escobedo* dissent that the Court should have relied on the Fifth Amendment privilege rather than the Sixth Amendment right to counsel as a restriction on police interrogation. See *Escobedo v. Illinois*, 378 U.S. at 497.

⁶⁸⁰ See Herman, *supra* note 601, at 735 n.18 (collecting commentaries), 737-40 (collecting cases). In January 1987, the United States Department of Justice released a report that had been submitted almost a year earlier. The report urged the overruling of *Miranda*. OFFICE OF LEGAL POLICY. U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION (Feb. 12, 1986). Even in this report, however, it was accepted that the constitutional privilege should apply to police interrogation. *Id.* at 42.

scope of the privilege so generously as to remove any lingering doubt about its applicability to police interrogation.⁶⁸¹ Then, in 1986, Chief Justice Rehnquist, referring to cases of police interrogation that were not governed by *Miranda*, said, "The Court has retained [a] due process focus, even after holding, in *Malloy v. Hogan*, that the Fifth Amendment privilege against compulsory self-incrimination applies to the states."⁶⁸² One cannot know whether the Chief Justice intended to revive the debate, but his words are susceptible to that interpretation.⁶⁸³ It is therefore within the realm of reasonable speculation that, if the Court should ever overrule *Miranda*, it might, as did Justices Harlan and White in *Miranda*, base a part of its rationale on Wigmore's insistence that the privilege is inapplicable to police interrogation. For that reason, ignoring the force of precedent and the weight of commentary, I now want to look at the problem anew. First, I shall consider Wigmore's argument against applying the privilege to police interrogation. Next, I shall ask whether the history, operations, and objectives of the privilege justify not applying it to police interrogation. Finally, I shall look at the problem from a general policy perspective. All of these considerations will, I believe, amply demonstrate that Wigmore's position is footless, and that the Court was right in both *Bram* and

⁶⁸¹ In *Schmerber v. California*, 384 U.S. 757, 760-65 (1966), the Court held that the privilege was not violated when a doctor obeyed a police officer's order to withdraw blood from a suspect. The basis for the holding was that the blood was not a testimonial communication. No member of the Court expressed any doubt that the privilege was applicable to police proceedings. In *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), Justice White, writing for the Court, said the privilege was applicable not just in trial criminal proceedings, but "in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." Over a decade later, Justice White quoted his own words approvingly in *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984).

One year after *Miranda*, Lord Reid, reviewing a number of English cases, some of which involved police interrogation, said,

I do not think that it is possible to reconcile all the very numerous judicial statements on the rejection of confessions but two lines of thought appear to underlie them: first, that a statement made in response to a threat or promise may be untrue or at least untrustworthy: and, secondly, that *nemo tenetur seipsam prodere*.

Commissioners of Customs and Excise v. Harz, 1967 App. Cas. 760, 820 (appeal taken from Eng.)

⁶⁸² *Colorado v. Connelly*, 479 U.S. 157, 163 (1986) (citation omitted).

⁶⁸³ Twelve years earlier, in *Michigan v. Tucker*, 417 U.S. 433, 442 (1974), then-Justice Rehnquist quoted Wigmore's criticism of cases such as *Bram* which used the privilege, instead of the involuntary confession rule, as a basis for excluding confessions obtained by police. In *New York v. Quarles*, 467 U.S. 649, 655 n.5 (1984), which was decided two years before *Connelly*, Justice Rehnquist again posited the due process rule as the alternative to *Miranda*.

Miranda in assessing the constitutionality of police interrogation against the standards of the privilege.⁶⁸⁴

B. *Wigmore's Argument*

1. *Genesis and Exegesis*

In the third edition of his treatise, published in 1940, Wigmore said, "So far as concerns *principle*, the two doctrines have not the same boundaries; *i.e.* the privilege covers only statements made in court under process as a witness; the confession-rule covers statements made out of court, but may also, overlapping, cover statements made in court."⁶⁸⁵ Wigmore did not really intend to limit the privilege to court proceedings, for he earlier said that it covered inquiries by legislatures and administrative agencies.⁶⁸⁶ He did, however, intend to limit the privilege to situations in which an interrogator either had or could resort to the power of contempt to compel answers. This impliedly excludes police interrogation.⁶⁸⁷ Wigmore, however, did not explicitly refer to the police or offer any justification for excluding from the scope of the privilege inquiries unattended by the contempt power.⁶⁸⁸

⁶⁸⁴ I am not saying that *Miranda* correctly *interpreted* the privilege to require advice and waiver. That much-debated issue is outside the scope of this Article. I am saying only that *Miranda* rightly recognized that *some version* of the privilege was applicable to police interrogation.

I believe it quite unlikely that the Court will overrule *Miranda* by holding that the privilege does not apply to police interrogation. Should the Court ever be disposed to overrule *Miranda*, the more likely ground will be that the privilege gives no more protection than the due process rule and thus requires neither advice nor waiver. See discussions *supra* at notes 11, 661 and accompanying text. Even the latter approach is not very likely. Indeed, the Court recently turned aside an effort to avoid *Miranda*. See *Minnick v. Mississippi*, 111 S.Ct. 486 (1990) (police officer may not solicit a waiver from suspect who has already consulted with counsel unless suspect first indicates willingness to discuss the investigation).

⁶⁸⁵ 8 WIGMORE, *supra* note 3, § 2266, at 387.

⁶⁸⁶ *Id.* § 2252, at 325-26.

⁶⁸⁷ See MORGAN, *supra* note 669, at 129 (Wigmore "seems to insist that the privilege has no application to confessions coerced by the police").

⁶⁸⁸ At the end of the entire section from which the quoted passage is taken, Wigmore said, "[f]or opinions making clear the distinction between the privilege-rule and the confession-rule, see those of Campbell, C.J., in *Reg. v. Scott*, 1 Dears. & Bell 47, 169 Eng. Rep. 909 (Cr. Cas. Res. 1856), Selden, J., in *Hendrickson v. People*, 10 N.Y. 33 (1854), and in *People v. McMahon*, 15 N.Y. 386 (1857)." 8 WIGMORE, *supra* note 3, § 2266, at 388 n.3. It is not clear whether Wigmore viewed these opinions as supporting the assertion that "the privilege covers only statements made . . . under process as a witness," or whether he saw them only as supporting other claimed distinctions between the two

The 1961 revision of Wigmore's treatise explicitly refers to police interrogation: "The privilege at common law did not apply to police interrogations, and, in view of the development of the complementary constitutional doctrine excluding coerced confessions, it is doubtful that there is sufficient reason today to distort the privilege to cover this situation."⁶⁸⁹ A footnote offers the rationale for excluding police interrogation from the coverage of the privilege:

Since police have no legal right to compel answers, there is no legal obligation to which a privilege in the technical sense can apply. That is, it makes no sense to say that one is privileged not to disclose—that one is excused from the legal consequences of contumacy—when there are no legal consequences of contumacy.⁶⁹⁰

The words, however, are not those of Wigmore, who died in 1943, eighteen years before publication of the 1961 revision. Rather, they are the words of the reviser, Professor John McNaughton. McNaughton tried out an earlier version of his position in 1960 when he spoke at an international conference on the privilege.⁶⁹¹ His speech was published in the same year.⁶⁹² In it, he asked, "Does the privilege apply in the police station?" His answer was, "No, it does

protections. It is clear, however, that these opinions are irrelevant to the quoted assertion. *Scott*, discussed *supra* notes 509–14 and accompanying text, does not address whether the privilege is limited to situations of legal process. Nor does it deal with police interrogation. Rather, it deals with bankruptcy proceedings from which the common law privilege was withheld by statute.

Hendrickson involves neither police interrogation nor any distinction based on whether a witness is called under process. In that case, a murder victim's husband was called as a witness at a coroner's inquest and answered questions under oath without objection. He was subsequently indicted for the murder, and his testimony was used against him. The court held the statements admissible and affirmed the conviction. Judge Selden *dissented*. He opined that the mental agitation of the witness made his statements inadmissible under the involuntariness rule even if they did not violate the privilege. Selden's dissenting view in *Hendrickson* became the majority view in *McMahon*, in which a murder suspect was examined under oath at a coroner's inquest. For a discussion of on-oath examinations, see *supra* notes 384–85 and accompanying text. Neither of Selden's opinions addresses any of the issues with which we are now concerned. In my research for this Article, I did not find any case decided during, or shortly after, the emergence of either the common law or the constitutional privilege which distinguishes between examinations "under process" and other examinations.

⁶⁸⁹ 8 WIGMORE, *supra* note 3, § 2252, at 328–29.

⁶⁹⁰ *Id.* at 329 n.27.

⁶⁹¹ See 51 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 129–30 (1960).

⁶⁹² John T. McNaughton, *The Privilege Against Self-Incrimination: Its Constitutional Affection, Raison d'Etre and Miscellaneous Implications*, reprinted in CLAUDE R. SOWLE, POLICE POWER AND INDIVIDUAL FREEDOM 223 (1962).

not.”⁶⁹³ Appended to the answer was a footnote identical to the one quoted immediately above.⁶⁹⁴ McNaughton was apparently dissatisfied with his own answer, however, for he promptly added, “*But this is a quibble*. Both policies of the privilege which I accept, as well as most of those which I reject, apply with full force to insure that police in informal interrogations not have the right to compel self-incriminatory answers.”⁶⁹⁵ Yet, when McNaughton integrated his article into his revision of Wigmore, he curiously omitted this passage, said that it would be a distortion of the privilege to apply it to police interrogation, and asserted, instead, his preference for the involuntary confession rule as the sole restriction.⁶⁹⁶

That the author of the most widely cited argument against applying the privilege to police interrogation regarded it as a “quibble” is some reason not to take it seriously. Chief Justice Rehnquist’s opaque statement in *Connelly*, however, is reason to do precisely the opposite and deal with the argument at face value.

McNaughton’s argument involves two premises: (1) that the protection against compulsory self-incrimination is properly characterized as privilege only; and (2) that evidentiary privileges exist only in situations in which a questioner has or may resort to the power of contempt to compel an answer. From these premises, McNaughton concludes that the self-incrimination protection should not be applicable to police interrogation because police lack the contempt power. Given his premises, McNaughton’s conclusion is correct. McNaughton, however, makes no effort to demonstrate that the premises are correct; he merely *assumes* that they are. Whether they are correct is a question that deserves some discussion.

2. Privilege Only?

I am going to give this question short shrift because there is less to it than meets the eye. The word “privilege” is sometimes used in opposition to “disqualification” or “incompetency.”⁶⁹⁷ It is also used in opposition to “right.”⁶⁹⁸ One cannot tell in which sense McNaughton is using the word, and

⁶⁹³ *Id.* at 151.

⁶⁹⁴ *Id.* at 151 n.56. In the same footnote, after the quoted material, McNaughton fairly set out contrary arguments.

⁶⁹⁵ *Id.* at 151–52 (emphasis added).

⁶⁹⁶ McNaughton did, however, include verbatim the reasons in support of applying the privilege which he had mentioned in his article. See 8 WIGMORE, *supra* note 3, at 329 n.27.

I have not tried to discover why McNaughton omitted the quoted paragraph. I suspect that he was influenced by the publisher’s loyalty to the memory of Wigmore. Had he simply changed his mind, it is likely that he would have said so.

⁶⁹⁷ See, e.g., MAGUIRE, *supra* note 669, at 78–92.

⁶⁹⁸ See *infra* notes 706–08 and accompanying text.

it is therefore difficult to respond to his implication that the protection against compulsory self-incrimination is properly characterized as privilege only.

The distinction between "privilege" and "incompetency" is not clear,⁶⁹⁹ but scholarly discussions of the matter invariably classify the self-incrimination protection as a privilege.⁷⁰⁰ In this sense, McNaughton's characterization is amply supported.

Whether the self-incrimination protection is a "privilege" as opposed to a "right" (another unclear distinction⁷⁰¹) is a question that is apparently too frothy for evidence scholars. I have found no discussion of it in any evidence treatise, including Wigmore's, and scant discussion of it elsewhere.⁷⁰² The common law protection against compulsory self-incrimination was not originally called a privilege. Indeed, in cases that arose shortly after establishment of the privilege, courts gratuitously intervened to prohibit questions that sought incriminating answers.⁷⁰³ Gratuitous intervention implies a right and correlative duty.⁷⁰⁴ In later cases, however, courts waited until the witness claimed the protection.⁷⁰⁵ Judicial abstinence implies a privilege.

Regardless of the situation at common law, however, the protection we have today comes from the Constitution. The Fifth Amendment does not explicitly refer either to right or to privilege. Its language ("nor shall be compelled in any criminal case to be a witness against himself"), however, speaks to interrogators. It says that interrogators are under a duty to refrain from compulsion, and thus implies that witnesses have a correlative right to be free from compulsion.⁷⁰⁶ At the same time, the constitutional protection is administered in much the same way that courts administer evidentiary

⁶⁹⁹ See MAGUIRE, *supra* note 669.

⁷⁰⁰ See 1 MCCORMICK, *supra* note 417, ch. 13; MAGUIRE, *supra* note 669, at 102-19.

⁷⁰¹ See 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1582 (1986) (discussing the "Right-Privilege Distinction") (encyclopedia entry written by Dennis J. Mahoney and Kenneth L. Karst).

⁷⁰² See LEVY, *supra* note 13, at vii-viii (characterizing protection as a right); Benner, *supra* note 246, at 62-63 (perhaps same).

⁷⁰³ See *supra* note 218 and accompanying text.

⁷⁰⁴ See Benner, *supra* note 246, at 62-63.

⁷⁰⁵ See *supra* note 218 and accompanying text.

⁷⁰⁶ In setting out arguments contrary to the one he posited in his revision of Wigmore, Professor McNaughton said, "[A]lthough constitutional language in this area is not too helpful, the self-incrimination clause in no instance grants, in terms, a 'privilege' to be free from legal compulsion, but in most instances states simply that the person shall 'not be compelled to give evidence against himself.'" 8 WIGMORE, *supra* note 3, § 2252, at 329 n.27.

privileges. For example, both the constitutional protection and evidentiary privileges must ordinarily be claimed.⁷⁰⁷

The constitutional protection against compulsory self-incrimination thus partakes of both right and evidentiary privilege, and it is feckless to assert that it is a privilege only. Moreover, "one cannot refuse to answer questions until questions are asked. A constitutional privilege is defensive, but it may be asserted as of right. Thus, there is not necessarily a diminution of the right against self-incrimination when that right is called a privilege."⁷⁰⁸ If the constitutional protection is both a right and a privilege or a right administered as a privilege, then deciding on the correct label becomes a game that is not worth the candle. In addition, even if we concede for the sake of argument that the protection is primarily a privilege, in any sense of the word, it does not follow that privileges must be linked to the contempt power. That is the more important matter, and I turn to it immediately.

3. *Are Evidentiary Privileges Inherently Linked to the Power of Contempt?*

McNaughton's second assumption focuses on nothing that is peculiar to the privilege against compulsory self-incrimination. Rather, it deals generally with evidentiary privileges. Issues relating to evidentiary privileges ordinarily arise in a judicial setting when a witness declines to testify on the ground of privilege or when a party seeks to block testimony on the same ground. Thus, evidentiary privileges are ordinarily *contextually* linked to proceedings in which answers may be compelled by the contempt power. Professor McNaughton, however, goes beyond context by asserting that an evidentiary privilege is nothing more than an excuse "from the legal consequences of contumacy." If "there are no legal consequences of contumacy," then there is no privilege.

Let's test McNaughton's position with a hypothetical case. Suppose my wife tells me in confidence that she committed a crime. Subsequently, we are both taken to the police station for interrogation. Asked whether my wife made any statements to me about the crime, I reply, "I refuse to answer on the ground that the information is protected both by the privilege for anti-marital facts⁷⁰⁹ and the privilege for confidential communications between spouses."⁷¹⁰

⁷⁰⁷ See 1 MCCORMICK, *supra* note 417 § 84 (marital privilege); *id.* §§ 92-93, at 338-43 (attorney-client privilege); *id.* at § 103 (physician-patient privilege); 8 WIGMORE, *supra* note 3, § 2268 (self-incrimination privilege).

⁷⁰⁸ 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1582, 1583 (1986) (discussing the "Right-Privilege Distinction") (encyclopedia entry written by Dennis J. Mahoney and Kenneth L. Karst).

⁷⁰⁹ See 8 WIGMORE, *supra* note 3, §§ 2227-2245 (chapter entitled "Privilege for Anti-Marital Facts"). Others refer to the privilege as an incompetency. See JOHN J. MCKELVEY, EVIDENCE 520 (5th ed. 1944).

My wife, who is present, asserts the same grounds in refusing to let me answer. Must the officer respect the invocation of these privileges and desist from pressing me? Suppose he replies, "Neither of these privileges exists at the police station, so you have to answer my questions." If I answer the questions, has the officer violated my right, or my wife's, by inducing me to give detrimental information that my wife had given to me in confidence? Moreover, putting aside any hearsay objection, may the officer subsequently reveal in court against my wife what I was induced to disclose?

I take it that McNaughton would not require the officer to respect my assertion of the two privileges. He would say that the officer lacked the contempt power, that there were "no legal consequences of contumacy," and that neither privilege, therefore, existed at the police station. If the officer induced me to yield the information, he did not act improperly. If it was not a violation of either privilege to obtain the information from me in the first instance, then it is also not a violation of the privilege for the officer to divulge it in court against my wife.

I find these results strange. If I have correctly interpreted McNaughton, he would let the state do indirectly what it cannot do directly. As long as the privilege-holder objects,⁷¹¹ the state cannot make me testify in court against my wife. Denying the privileges at an official investigation and letting the officer testify at trial are as offensive to the policies underlying the privileges as compulsion in the courtroom. McNaughton's position is therefore contrary to common sense. It is also contrary to the cases. These cases deal with anti-marital facts rather than confidential communications. The cases do not directly address whether the privilege was violated when the information was acquired by the witness. Rather, they deal only with whether the witness may testify in court. Although the cases are few, most of them hold the evidence inadmissible at trial even though it comes from the lips of a third person.⁷¹² Trial

⁷¹⁰ See 8 WIGMORE, *supra* note 3, §§ 2332-2341 (chapter entitled "Communications Between Husband and Wife").

⁷¹¹ In some jurisdictions, I would possess the privilege not to reveal anti-marital facts. See *Trammel v. United States*, 445 U.S. 40, 48-49 n.9 (1980) (collecting statutes). In most jurisdictions, my wife, as confidential communicant, would hold the privilege for confidential, spousal communications. See 1 MCCORMICK, *supra* note 417, § 84.

⁷¹² See *Olender v. United States*, 210 F.2d 795 (9th Cir. 1954) (affidavit submitted by defendant's wife in a welfare matter relating to her mother was inadmissible to impeach defendant's testimony in tax evasion trial; defendant, however, waived the privilege by failing to object); *United States v. Winfree*, 170 F. Supp. 659 (E.D. Pa. 1959) (court denied a pre-trial motion to suppress, but indicated that it would not admit at defendant's tax evasion trial a statement given by defendant's wife to I.R.S. agents); *State v. Suits*, 251 S.E.2d 607 (N.C. 1979) (police officer not permitted to testify that defendant's wife gave the officer a knife); *Weaver v. State*, 121 P.2d 1016 (Okla. Crim. App. 1942) (police chief not permitted to testify that defendant's wife said that defendant controlled a closet in which bootleg liquor had been found); *contra*, *Parks v. State*, 46 S.E.2d 504 (Ga. 1948) (police

inadmissibility implies that the officer offended the privilege by even obtaining the information.⁷¹³

Professor McNaughton is therefore on shaky ground in assuming that evidentiary privileges (including the privilege against compulsory self-incrimination) are inherently linked to proceedings in which the questioner has or may resort to the power of contempt to compel answers. However, refuting or questioning an argument is quite different from establishing its converse. Even if McNaughton is wrong, it does not necessarily follow that the self-incrimination protection should apply to police interrogation. Consequently, in the next subdivisions of this Article, I shall ask whether the history, operations, and objectives of the self-incrimination protection (which, for the sake of convenience, I shall continue to call a "privilege"), set it apart from other privileges and prohibit applying it to police interrogation.

C. *Reconsidering History*

1. *Introduction*

Before reconsidering the history of the privilege, I want to set the terms of the discussion by identifying the question with which I am concerned. I shall not try to prove that the history of the privilege *requires* applying it to police interrogation. Rather, I am concerned with the converse: whether the history of the privilege *prohibits* applying it to police interrogation? If the answer to that question is "yes," then a powerful constraint will have emerged. If the answer is "no," then we will be free to consider other matters.⁷¹⁴

2. *The English Common Law Privilege*

The history of the English common law privilege is replete with episodes in which a person was brought before an adjudicative body, asked to take the oath *ex officio*, and jailed for refusal. The slow development of the privilege is thus *associated* with two phenomena: the authority to administer and insist on the oath and the authority to punish refusal. But it does not follow that these

officer permitted to testify that defendant's wife gave the officer clothing belonging to defendant).

⁷¹³ Both Wigmore and McNaughton seem to approve of the cases. In his 1940 edition, Wigmore wrote, "That which is privileged is testimony in any form, by the wife or husband against the other. *Extrajudicial admissions* are a sort of testimony; hence, they are equally privileged with testimony on the stand." 8 WIGMORE, EVIDENCE § 2232, at 235 (3d ed. 1940) (cross-reference omitted). This statement appears in substance in the McNaughton revision of 1961. See 8 WIGMORE, *supra* note 3, § 2232, at 225-26.

⁷¹⁴ See Kamisar, *Equal Justice*, *supra* note 5, at 30 ("I do not claim that this long and involved history displaces judgment, only that it liberates it.").

matters of *context* are also matters of *limitation*, for history also discloses many instances in which the recalcitrant's objection was not to the oath as such, but to its incriminating effect, as well as instances in which persons refused to incriminate themselves although examined without oath.

One of the earliest examples occurred in 1382 when John Ashton, Wycliffe's disciple, took the oath at an ecclesiastical inquiry, but still refused to answer questions about his religious beliefs. He was treated as though he had confessed (*pro confesso*) and was imprisoned for heresy.⁷¹⁵

Almost two centuries later, the situation was the same. In the 1550's, during the height of the Marian inquisition, Protestant clergy refused to answer questions about their religious beliefs. Their objection was not that an oath was intrinsically wrong, but that it sought incriminating information.⁷¹⁶

The ascension of Elizabeth in 1558 reversed the religions, but maintained the inquisition. In 1569, some barristers refused to answer questions about their religious practices even though "[t]he record does not reveal that the commissioners required any of the fourteen lawyers whom they examined to take the oath."⁷¹⁷ In the 1580's occurred the trials of Puritans Blake, Wigginton, and Udall. Blake complained about compulsory self-incrimination;⁷¹⁸ Wigginton claimed that self-incrimination was an unnatural act;⁷¹⁹ and Udall refused to submit to an examination either with or without oath.⁷²⁰

By 1620, as Professor Levy has observed, "more and more people were beginning to think that to coerce a man to testify against himself, with or without oath, was simply unjust—an outrage on human dignity and a violation of the very instinct of self-preservation."⁷²¹ As one example, Levy cites the inquiry by the House of Lords into misconduct by Sir Giles Mompesson. The

⁷¹⁵ See LEVY, *supra* note 13, at 55.

⁷¹⁶ See *supra* note 84 and accompanying text; LEVY, *supra* note 13, at 77. Professor Levy's discussion is based on JOHN FOXE, THE ACTS AND MONUMENTS OF JOHN FOXE (London, R.R. Seeley & W. Burnside, Stephen Reed Cattley ed., 1837-41). The first edition, published in 1563, and commonly referred to as the Book of Martyrs, recounts various trials in great detail. Foxe's work was not available to me *in toto*, but I did read a number of photocopied pages kindly provided by the Library of Calvin College. The pages concerned the examinations of Protestant ministers Bland, Saunders, and Shetterdon. The examinations show that the concern of the recalcitrants was not the oath as such, but the fact that they were being asked to incriminate themselves. See 6 FOXE, *supra*, at 625-26 (examination of Saunders); *id.* at 290-301 (examination of Bland); *id.* at 306-10 (examination of Shetterden).

⁷¹⁷ LEVY, *supra* note 13, at 97.

⁷¹⁸ See *supra* note 96 and accompanying text.

⁷¹⁹ See *supra* note 102 and accompanying text.

⁷²⁰ See *supra* note 108 and accompanying text.

⁷²¹ LEVY, *supra* note 13, at 263.

investigating committee "urged none to accuse himself."⁷²² Another example occurred nine years later when Charles sought an advisory opinion from the judges as to whether it was a high contempt for a person to refuse to be examined regarding treason. The judges replied that it was high contempt as long as "this do not concern himself, but another, nor draw him to danger of treason or contempt by his answer."⁷²³ The answer appears to be a rather broad statement of the *nemo tenetur* maxim, a statement that has nothing to do with whether the examination is or is not on oath.

Around 1635, William Hudson published a treatise on the Court of Star Chamber. His discussion of summary, oral proceedings contains a passage, quoted much earlier in this Article,⁷²⁴ which may be read as saying that the common law privilege was regarded as applicable to unsworn interrogations conducted by royal messengers of persons whom they had arrested.⁷²⁵ Royal messengers or "pursuivants"⁷²⁶ performed some functions similar to those performed by modern police officers. If the emerging privilege was regarded as applicable to their activities, then the history of the privilege affirmatively contradicts the Wigmore/McNaughton position.

There is no doubt that all of the developments in the long history of the privilege began to coalesce late in 1637 in the first of the cases involving John Lilburne.⁷²⁷ Lilburne's detailed account of the pretrial examination in that case makes no reference to his being sworn. Hence, it is possible that he was not put under oath. Whatever the case, his refusal to answer questions was based not on aversion to an oath as such, but on his perception that the questions were irrelevant to the charge and sought to elicit evidence of other crimes.⁷²⁸ When his case moved from preliminary examination to trial in the Court of Star Chamber, Lilburne resisted disclosure on many grounds, including his unwillingness to supply evidence against himself when there was no other

⁷²² *Id.* (quoting Proceedings in Parliament against Sir Giles Mompesson, 2 Cobbett's State Trials 1119, 1123 (1620)).

⁷²³ Proceedings against William Stroud and Others, 3 Cobbett's State Trials 235, 237 (1629).

⁷²⁴ See *supra* text accompanying note 244.

⁷²⁵ See *supra* note 246.

⁷²⁶ See 2 GILES JACOB, LAW DICTIONARY, (T.E. Tomlins ed., London, A. Strahan 1797) (unpaginated) (defining *poursuivant* as "[t]he King's messenger attending him, to be sent on any occasion or message; as for the apprehending a person accused or suspected of any offence").

⁷²⁷ See *supra* notes 193–202 and accompanying text. Lilburne's own account of the case is reported in Trial of John Lilburne and John Wharton, 3 Cobbett's State Trials 1315 (1637).

⁷²⁸ See *id.* at 1318.

evidence of wrongdoing.⁷²⁹ Punished for contempt, he said from the pillory that self-accusation was against the self-protective law of nature.⁷³⁰

In 1641, Parliament, having been convened by King Charles in 1640 to raise money in defense of impending civil war, abolished the courts of High Commission and Star Chamber and made it criminal to administer the oath *ex officio* in church proceedings.⁷³¹ The oath thus faded as a *datum* in the development of the privilege, but the privilege continued to develop. Although the bill did not purport to affect parliamentary proceedings, Parliament forebore to compel even unsworn self-incrimination in *Proceedings against the Twelve Bishops*.⁷³² Thus, as it had done two decades earlier in the *Mompesson* inquiry, Parliament recognized that the privilege was not limited to judicial proceedings.

But Parliament was fickle. In 1645, it jailed Lilburne for refusing to answer questions in a parliamentary inquiry into an alleged criminal libel.⁷³³ Lilburne's refusal, however, indicated his view that the privilege of silence was not limited to judicial proceedings. Indeed, while he was in jail, he wrote a tract broadly claiming that no governmental authority could engage in the practices that had been outlawed with the abolition of Star Chamber.⁷³⁴ Lilburne even went so far as to question the common-law practice of interrogating defendants in criminal proceedings.⁷³⁵

⁷²⁹ See *id.* at 1322.

⁷³⁰ See *id.*

⁷³¹ See *supra* notes 202–03 and accompanying text.

⁷³² See *supra* notes 205–06 and accompanying text. Parliament's forbearance occurred after the Bishops, who were unsworn, declined to give self-incriminating information.

⁷³³ LEVY, *supra* note 13, at 289.

⁷³⁴ See LEVY, *supra* note 13, at 290; see also *supra* note 207 and accompanying text.

⁷³⁵ See *supra* note 207 and accompanying text. Lilburne's tract is reprinted in 3 WILLIAM HALLER, *TRACTS ON LIBERTY IN THE PURITAN REVOLUTION 1638–1647*, at 258–307 (1934). Lilburne's concern about interrogation in common law proceedings is voiced in HALLER, *supra* at 266. In ordinary criminal proceedings, there was *unsworn* interrogation of the accused at preliminary examination and *unsworn* interrogation of the defendant at trial. See *supra* notes 124, 142 and accompanying text. That Lilburne questioned these practices shows that his conception of the privilege was not linked to an oath.

To avoid confusion, I want to repeat what I said about oaths, *supra* text accompanying note 385. The oath *ex officio* was quite different from the oath with which we are familiar today. The modern oath does not absolutely obligate the witness to answer. For various legally recognized reasons, the witness may refuse. If the witness chooses to answer, however, we demand that the answer be truthful. The oath *ex officio* also sought the truth. Of much greater importance, however, it obligated the witness to answer. A part of the history of the privilege is *contextually* linked to the oath *ex officio*. However, the privilege was asserted even after the disappearance of that oath. See *infra* notes 736–43 and

Lilburne was again jailed in 1646 when he refused to answer questions at another parliamentary inquiry.⁷³⁶ Lilburne's friend and ally Richard Overton, who came to Lilburne's defense, was also jailed, but managed to circulate a pamphlet in which he insisted that no governmental authority should force any person to incriminate himself.⁷³⁷ In 1647, this theme was repeated in a Leveller petition which urged the House of Commons to permit "no authority whatsoever" to compel self-incrimination.⁷³⁸ A year later, Lilburne and Overton were freed and complained that the Commonwealth government, which had overthrown Charles I, had merely substituted its own form of tyranny for the Star Chamber and High Commission.⁷³⁹

The year 1649 saw a great irony: the trials for high treason of both Charles I and Lilburne, who had helped to oust him. Each trial contributed something to the development of the privilege. In the trial of Charles, the protection was extended, apparently for the first time, to a nonparty witness.⁷⁴⁰ The proceedings against Lilburne began with a preliminary inquiry conducted by John Bradshaw, presiding officer of the Council of State. Although Lilburne knew that Bradshaw was merely gathering evidence for trial, not then trying him, Lilburne refused to answer, thus manifesting, as he had in 1637, his belief that the protection against compulsory self-incrimination was applicable to pretrial, evidence-gathering proceedings.⁷⁴¹ At his trial, which resulted in an acquittal, Lilburne continued to complain about Bradshaw's effort to get information from him.⁷⁴²

In 1651, Lilburne was banished after a summary conviction for defaming a member of Parliament. He returned in 1653, was tried for violating the banishment order, and was acquitted by a maverick jury. Parliament then asked the Council of State to examine the jury apparently for the purpose of ascertaining whether the jury had been bribed. Although the inquiry was pre-charge, not just pretrial, some jurors refused to answer.⁷⁴³

There had been some acknowledgement of a privilege of silence before Lilburne's banishment. In the decades after Lilburne's death in 1657, even

accompanying text. Lilburne's attack on the unsworn examination of suspects and defendants in ordinary criminal cases divorces the privilege from *any* oath.

⁷³⁶ See LEVY, *supra* note 13, at 292; see also *supra* notes 207-08 and accompanying text.

⁷³⁷ See LEVY, *supra* note 13, at 293-94; see also *supra* text preceding note 208.

⁷³⁸ See LEVY, *supra* note 13, at 296; see also *supra* note 209 and accompanying text.

⁷³⁹ See *supra* notes 210-11 and accompanying text.

⁷⁴⁰ See *supra* notes 215-16 and accompanying text.

⁷⁴¹ See LEVY, *supra* note 13, at 299; see also *supra* note 211 and accompanying text.

The 1637 examination is discussed *supra* notes 192-93 and accompanying text.

⁷⁴² Trial of John Lilburne, 4 Cobbett's State Trials 1269, 1280 (1649).

⁷⁴³ See *supra* note 214 and accompanying text.

during the turmoil of the Restoration, the privilege was firmly recognized and generously applied.⁷⁴⁴

This brief recapitulation of the history of the English common law privilege lends no support to the Wigmore/McNaughton position. It is, of course, true that, with the possible exception of William Hudson's reference to royal messengers,⁷⁴⁵ the history discloses no linkage of the privilege to "police" interrogation. The simple reason for this, however, is that the first police department in England was not formed until 1829, and the first detective branch was not formed until 1842.⁷⁴⁶ Until the beginning of the nineteenth century, interrogation was essentially a judicial or quasi-judicial task.⁷⁴⁷ Although law enforcement officers existed during the formative period of the privilege, their function was to keep the peace and apprehend offenders, not to interrogate.

What the history of the English common law privilege does show is that the privilege was broadly conceived and applied. Part and parcel of the "first great outburst of democratic thought in history,"⁷⁴⁸ it was not originally limited to incrimination, but protected against loss of reputation; it was not limited to defendants, but protected witnesses; and it was not limited to judicial proceedings, but came to restrict all of the agencies which then engaged in interrogation.⁷⁴⁹ It was asserted in adjudicative proceedings, pre-adjudicative examinations, and even in pre-charge inquiries. It was used as a defense against the oath *ex officio*, but also to fend off unsworn examination.

Even after the disappearance of the oath *ex officio*, the privilege was contextually linked to the contempt power of official agencies of interrogation. But nothing in the history of the privilege suggests that this was regarded as a limitation. To the contrary, there is every reason to believe that those who

⁷⁴⁴ See *supra* notes 217–20 and accompanying text.

⁷⁴⁵ See *supra* notes 244, 246 and accompanying text.

⁷⁴⁶ Kamisar, *Dissent*, *supra* note 5, at 66 n.41.

⁷⁴⁷ See *id.*

⁷⁴⁸ See *supra* note 209 and accompanying text.

⁷⁴⁹ I stand by the statement in the text even though, as the detailed history discloses, *supra* notes 124, 142, 174, 175, 221, 225–31 and accompanying text, in ordinary criminal cases the self-represented accused was subjected to both trial and pre-trial interrogation. There is no evidence that defendants were jailed or threatened with jail for refusing to answer questions at trial, and refusal was common. See 1 STEPHEN, HISTORY, *supra* note 81, at 358. As the 17th century closed, so largely did the practice of trial interrogation. See *supra* note 224 and accompanying text. As far as pretrial interrogation was concerned, neither force nor the threat of contempt was used to compel answers. See *supra* notes 225–31 and accompanying text. Some judges did use tricks to induce confessions or threatened to withhold bail if the suspect did not confess. See *supra* notes 228–30 and accompanying text. Neither tactic, however, was necessarily inconsistent with an evolving privilege. See *supra* text accompanying note 235. The privilege, it should be remembered, was to refuse to answer questions, not to be free from being asked.

were instrumental in the development of the privilege would have protested just as loudly against alternative tactics for compelling self-incrimination. Suppose that when Lilburne refused to answer Bradshaw's questions, Bradshaw said, "Then I will beat you with my truncheon, or I and a few colleagues will keep asking you questions until we wear you down," or "I will turn you over to the constable, and he will beat you with his truncheon, or he and a few of his colleagues will keep asking you questions until they wear you down." In any of these cases, is it believable that Lilburne, not having been threatened with jail for contempt, would have gone "gentle into that good night" by incriminating himself? ⁷⁵⁰ Absolutely not. Lilburne would have "burn[ed] and rave[d]"⁷⁵¹ against compulsory self-incrimination in *any* context. The essence of the asserted, and eventually accepted, privilege was that *any* form of governmental compulsion to incriminate was incompatible with human dignity, not just the contempt power.

Had I earlier assumed the burden of proving that the history of the English common law privilege requires applying it to police interrogation, I would rest content in the belief that I had carried the burden. But that was not what I set out to do. Rather, I was concerned only with whether history prohibits applying the privilege to police interrogation. The answer to that question surely has to be "no."⁷⁵²

3. *The American Common Law and Constitutional Privileges*

It would serve no useful purpose to try to summarize the rather sparse history of the American common law and constitutional privileges. It is enough to observe that the American privileges evolved from the same forces and in the same contexts as their English counterparts;⁷⁵³ that a concern about torture prominently underlay both American privileges,⁷⁵⁴ and was part of the backdrop against which the English privilege developed;⁷⁵⁵ that judicial interrogation was equally common and police interrogation equally unknown on both sides of the Atlantic during the period in question;⁷⁵⁶ and that in the early days, both state and federal constitutional privileges were generously

⁷⁵⁰ The quoted words are from Dylan Thomas's poem, "Do Not Go Gentle Into That Good Night," in *DEATH IN LITERATURE* 384 (Robert F. Weir ed., 1980).

⁷⁵¹ *Id.*

⁷⁵² For a similar conclusion, see Comment, *Adoptive Admissions, Arrest and the Privilege Against Self-Incrimination: A Suggested Constitutional Imperative*, 31 U. CHI. L. REV. 556, 559-63 (1964).

⁷⁵³ See generally *supra* notes 318-37 and accompanying text. However, there does seem to be less of the oath *ex officio* in the American history.

⁷⁵⁴ See *supra* notes 326, 334, 551 and accompanying text.

⁷⁵⁵ See *supra* notes 84, 130, 188-90, 200, 402-08, 416 and accompanying text.

⁷⁵⁶ See Kauper, *supra* note 122, at 1231-37.

interpreted by the courts.⁷⁵⁷ There is nothing in the history of either American privilege that gives greater support to the Wigmore/McNaughton position than it derives from the English common law privilege.

D. *Reconsidering Operations*

Nor does the Wigmore/McNaughton position find support in the operations of the common law and constitutional protections. Both protections shield actual and potential criminal defendants;⁷⁵⁸ both are directed against governmental action;⁷⁵⁹ both may be asserted in a variety of proceedings: judicial (including grand jury), non-judicial (legislative, administrative), adjudicative, non-adjudicative, criminal, and civil;⁷⁶⁰ and both have the primary effect of fending off an inquiry and the secondary effect of excluding evidence improperly obtained.⁷⁶¹ None of these operations is incompatible with applying the privilege to police interrogation.

E. *Reconsidering Objectives*

1. *The Common Law Privilege*

The common law privilege served certain collateral objectives.⁷⁶² The privilege was a "surrogate for freedom of conscience in the battle against state

⁷⁵⁷ See *supra* note 336 and accompanying text. Some American courts gratuitously protected witnesses and interpreted the word "incriminate" broadly enough to protect civil and reputational interests.

⁷⁵⁸ See *supra* note 376 and accompanying text (common-law privilege); *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (constitutional privilege).

⁷⁵⁹ See *supra* notes 463–64 and accompanying text (common-law privilege), and note 550 and accompanying text (constitutional privilege).

⁷⁶⁰ The previous discussion of the common law privilege clearly establishes the availability of the privilege in judicial, legislative, and administrative proceedings. See *supra* notes 218–23 and accompanying text (judicial), notes 206, 207, 290 and accompanying text (legislative); *Reg. v. Sloggett*, 7 Cox Crim. Cas. 139 (Eng. Crim. App. 1856) (privilege applicable at bankruptcy examination). The constitutional privilege has the same coverage. See *Quinn v. United States*, 349 U.S. 155 (1955) (legislative inquiry); *McCarthy v. Arndstein*, 266 U.S. 34 (1924) (bankruptcy proceeding); *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892) (grand jury). In his concurring opinion in *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 94 (1964) (dictum) (White, J., concurring), Justice White summed up the operation of the constitutional privilege by saying, "[t]he privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory. . . ."

⁷⁶¹ See *supra* note 374 and accompanying text (common law privilege), and notes 558–60 and accompanying text (constitutional privilege).

⁷⁶² See *supra* notes 429–30 and accompanying text.

control of religious and political beliefs and speech."⁷⁶³ The privilege also asserted a fair-play entitlement to notice of the charges and confrontation of accusers. Although these uses have been largely replaced by other protections, neither use is inconsistent with applying the privilege to police interrogation.

The direct objective of the common law privilege was to protect and preserve individual sovereignty and its underlying values and interests.⁷⁶⁴ The values underlying individual sovereignty are autonomy, dignity, and privacy. Underlying autonomy and dignity is an interest in bodily integrity. The common law privilege protected this interest by condemning torture. This interest is fully applicable to police interrogation. Indeed, the remnants of physical brutality in modern interrogation practice are more likely to occur in police interrogation than in any other governmental setting.⁷⁶⁵

Underlying the values of autonomy and privacy is an interest in mental integrity (repose, peace of mind, control over what others learn about one's self). The common law privilege protected this interest by condemning torture and the threat of torture, which engendered fear; by condemning browbeating, jail, and the threat of jail, which created stress; by condemning the unnatural act of self-incrimination, which also created stress; and by condemning all coercion which led to a loss of control over intimate information. This objective, too, is fully applicable to police interrogation. Although the police do not have a monopoly on these practices, and although they lack the legal authority to commit someone to jail for contempt, the police do use techniques of pressure to extract intimate information.⁷⁶⁶

Underlying all of the values and interests of individual sovereignty is the contingent or secondary objective of obtaining reliable confessions and avoiding the conviction of innocent people. The common law privilege vindicates this objective by condemning all forms of compulsion. That this objective applies to police interrogation is beyond argument.⁷⁶⁷ Indeed, the

⁷⁶³ *Id.*

⁷⁶⁴ See *supra* note 432 and accompanying text.

⁷⁶⁵ See Note, *The Privilege Against Self-Incrimination: Does It Exist in the Police Station?*, 5 STAN. L. REV. 459, 476 (1953). Some cases involving police brutality are discussed in Herman, *supra* note 601, at 733, 753, 754 n.156 (1987).

⁷⁶⁶ See 8 WIGMORE, *supra* note 3, § 2252, at 329 n.27 ("methods to compel disclosure threatened or used by police may be more fearsome than those threatened or used by a court"); Alfred C. Clapp, *Privilege Against Self-Incrimination*, 10 RUTGERS L. REV. 541, 544 (1956) (risk of police coercion supplies the need for the privilege at police interrogation); Note, *supra* note 765, at 476 (protracted questioning is more likely to occur at police station than in court).

⁷⁶⁷ See Note, *supra* note 765, at 477 (recognizing the risk of unreliability in some confessions obtained by police interrogation).

same objective is at the core of the common law involuntary confession rule, which clearly applies to police interrogation.⁷⁶⁸

2. *The Constitutional Privilege*

The same objectives underlie both the common law and the constitutional privileges.⁷⁶⁹ If the objectives of the common law privilege apply to police interrogation, the same is necessarily true of the constitutional privilege.

3. *Conclusion*

In his 1960 speech and article, Professor McNaughton identified twelve policies advanced in justification of the common law and constitutional privileges. He rejected eight, was lukewarm about one (the privilege as surrogate for freedom of conscience), took no position on another (the privilege as a device for fending off random fishing expeditions), and accepted two.⁷⁷⁰ The eight he rejected are, for the most part, either redundancies or *post facto* rationalizations that have nothing to do with the forces that led to the privilege. The two he accepted (the avoidance of inhumane treatment and the right to be let alone) lie at the core of individual sovereignty and overlap the values and interests advanced in the discussion above. Speaking of the entire group of twelve policies, McNaughton concluded: "Both policies of the privilege which I accept, as well as most of those which I reject, apply with full force to insure that police in informal interrogations not have the right to compel self-incriminatory answers."⁷⁷¹ As well as anything in the field, McNaughton's analysis and conclusion refute the position he himself took a year later in the 1961 revision of Wigmore's evidence treatise. As McNaughton recognized, the policies underlying the privilege not only *permit* applying it to police interrogation, they *require* applying it. Indeed, the case for applying the privilege is even stronger than McNaughton realized. As discussed earlier in this Article, the common law privilege and the common law confession rule have related histories and similar operations and objectives. As a result of *Connelly*, however, the constitutional privilege and the constitutional confession rule are even more alike than their common law counterparts. *Connelly* treats both the constitutional privilege and the constitutional confession rule in the same way. As I stated earlier:

⁷⁶⁸ See *supra* notes 302, 348, 351, 357, 358 and accompanying text.

⁷⁶⁹ See *supra* notes 615-17 and accompanying text.

⁷⁷⁰ McNaughton, *supra* note 692, at 142-51.

⁷⁷¹ *Id.* at 151-52.

Under each, a concern for reliability is secondary. Under each, the primary concern is inquisitorial, official action that fundamentally flouts the sovereignty of the individual and its underlying values of autonomy, dignity, and privacy. As a result of *Connelly* and other cases . . . it is hard to find any difference between the objectives of the constitutional protections.⁷⁷²

Given the fact that the constitutional confession rule was created for cases of police interrogation, there is even more reason today than when McNaughton wrote for applying the indistinguishable privilege to police interrogation.

F. Policy Considerations

Even if the lessons of history, operations, and objectives were less clear, there would remain a strong need for applying the privilege to police interrogation.

Canvassing the arguments for and against the privilege in 1935, Wigmore himself gave currency to the argument that the privilege was needed more in preliminary inquiries than at trial.⁷⁷³ However, he focussed his discussion on grand juries and rogue prosecutors and did not carry it into the police interrogation room. Five years later, in the third edition of his treatise, Wigmore enlarged the point:

The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer—that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse . . .⁷⁷⁴

Again, however, Wigmore directed his point against prosecutors and either did not see or chose to ignore its practical relevance to police interrogation.

Professor McNaughton picked up the cudgel in 1961. McNaughton, however, was keenly aware that Wigmore's point applied as well, if not better, to police interrogation.

[The reasons that support the privilege]—in varying degrees of intensity depending on the particular witness, the particular question, the particular kind of tribunal, the particular setting in which the question is asked—often merge like notes from the pipes of an organ to produce a chord of unanalyzable impact. The impact of the chord is most ominous and impressive when

⁷⁷² *Supra* note 639 and accompanying text.

⁷⁷³ JOHN H. WIGMORE, A STUDENTS' TEXTBOOK OF THE LAW OF EVIDENCE 388-89 (1935).

⁷⁷⁴ 8 WIGMORE, EVIDENCE § 2251, at 309 (3d ed. 1940).

questions are put by police (where, ironically, it is doubtful that the privilege as such is recognized at all)⁷⁷⁵

Yet, when push came to shove, McNaughton suppressed the irony and flatly asserted that the privilege did not apply to police interrogation.

McNaughton was wrong. The need for applying the privilege to police interrogation is as great as in any other setting and greater than in some to which the privilege has long been held applicable. In the early scheme of things, the Marian statutes conferred upon magistrates an evidence-gathering or detective-like role which they played in preliminary proceedings.⁷⁷⁶ Although some magistrates were abusive and used pressure and tricks to obtain confessions or admissions, they did not use force or the power of contempt.⁷⁷⁷ The privilege applied to the magistrate's proceeding. Indeed, early writers regarded the *nemo tenetur* maxim as applicable even before it became firmly rooted in English law.⁷⁷⁸

The evidence-gathering role of the magistrate began to wane in the early part of the nineteenth century and came to an end in 1848 when Lord Jervis's Act repealed the Marian statutes.⁷⁷⁹ Contributing to the decline of the magistrate was the emergence of police departments with detective divisions and their assumption of the magistrate's evidence-gathering role.⁷⁸⁰ The need for the privilege, however, did not diminish with the end of the magistrate's role. Although the police are not legally entitled to insist on answers and lack the power to cite for contempt, many suspects assume that the officer is entitled to an answer or that silence will incur some sanction.⁷⁸¹ In the days before *Miranda*, these misconceptions were abetted by the police, some of whom misrepresented that there was a legal obligation to answer⁷⁸² and all of whom

⁷⁷⁵ 8 WIGMORE, *supra* note 3, § 2252, at 318.

⁷⁷⁶ See *supra* note 122 and accompanying text; see also LEVY, *supra* note 13, at 325; Kauper, *supra* note 122, at 1232-33.

⁷⁷⁷ See *supra* notes 225-30 and accompanying text.

⁷⁷⁸ DALTON, *supra* note 124; FITZHERBERT & CROMPTON, *supra* note 125; LAMBARD, EIRENARCHA, *supra* note 135.

⁷⁷⁹ An Act to Facilitate the Performance of the Duties of Justices of the Peace Out of Sessions Within England and Wales With Respect to Persons Charged with Indictable Offences, 1848, 11 & 12 Vict., ch. 42, § 18 (Eng.) 88 STAT. AT LARGE (Eng.), 204. The development is described in Kauper, *supra* note 122, at 1234.

⁷⁸⁰ 8 WIGMORE, *supra* note 3, § 2252, at 329 n.27; Kamisar, *Dissent*, *supra* note 5, at 73-74; Kamisar, *Equal Justice*, *supra* note 5, at 29-30; Kauper, *supra* note 122, at 1234.

⁷⁸¹ Kamisar, *Dissent*, *supra* note 5, at 65; Kamisar, *Equal Justice*, *supra* note 5, at 31-32.

⁷⁸² 8 WIGMORE, *supra* note 3, § 2252, at 329 n.27. Even after *Miranda* the problem remains. See *Minnick v. Mississippi*, 111 S. Ct. 486, 488-89 (1990) (jailer told suspect that he had to talk with officer); *Edwards v. Arizona*, 451 U.S. 477, 479 (1981) (same). In

acted as though they were entitled to an answer.⁷⁸³ In terms of need, the case for applying the privilege to police interrogation is at least as strong as the case for applying the privilege to the magistrate's examination.

A separate facet of the need for the privilege is that the risk of criminal prosecution, conviction, punishment, and abusive interrogation is much greater in the police interrogation setting than in any other interrogational setting. It has long been held that the privilege may be claimed in civil proceedings and legislative inquiries, even though neither is itself a "criminal case" within the meaning of the Fifth Amendment and even though the risk of prosecution may be remote.⁷⁸⁴ That these proceedings are open to the public (indeed, that they may be televised), that the witness may be represented by counsel, and that the interrogator is therefore not likely to be abusive do not defeat the privilege. By contrast, police interrogation is "criminal" and its very purpose is to obtain evidence for use in a criminal prosecution; the fruits of police interrogation lead to criminal charges far more frequently than do the fruits of civil or legislative questioning; and, as noted earlier, abusive practices are more likely to occur in the interrogation room than in any other governmental setting.⁷⁸⁵ To apply the privilege in these former settings while denying application to police interrogation stands the privilege on its head.

If nothing intrinsic to the general concept of evidentiary privilege prohibits applying the self-incrimination privilege to police interrogation, then the need for the self-incrimination privilege should weigh in the balance. If nothing in the history, operations, and objectives of the self-incrimination privilege prohibits applying it to police interrogation, then the need for it should weigh even more heavily. Professor McNaughton was right in characterizing the arguments against applying the privilege as a "quibble." It is a pity that he did not stand by this conviction when he revised Wigmore's discussion of the privilege.

Edwards, Chief Justice Burger concurred on the specific ground that the jailer's statement made the suspect's purported waiver involuntary. *Id.* at 488.

⁷⁸³ On every one of the few occasions when I have been stopped for an alleged traffic offense, the officer acted peremptorily. On every one of those occasions, it never occurred to me, under the stress of the moment, that I did not have to answer the officer's questions. Other lawyers have confirmed my experience with their own.

⁷⁸⁴ See *supra* note 760 and accompanying text regarding the operation of the constitutional privilege. As long as the risk of prosecution is substantial enough to escape being called frivolous, the privilege may be asserted in these proceedings. See *BERGER*, *supra* note 85, at 87-88.

⁷⁸⁵ See *supra* note 765 and accompanying text.

VI. CONCLUSION

This Article has been driven by two questions. The first is whether, as Wigmore insisted in his treatise and Chief Justice Rehnquist implied in *Connelly*, the privilege against compulsory self-incrimination and the involuntary confession rule are distinct. In dealing with this question, I have separately considered the common law and constitutional protections. After examining the histories, operations, and objectives of the common law protections, I have concluded that the common law privilege and the common law confession rule are remarkably alike, supported by the same complex of values, including reliability. In only two situations, both of which fall outside the privilege, is there clearly a need for a separate rule barring the admissibility of involuntary confessions. In any case that falls within the boundaries of the privilege, however, no unique purpose is served by the confession rule and it is really nothing more than the exclusionary rule of the privilege. Insofar as the constitutional protections are concerned, the same conclusion emerges with even greater force, for, largely as a result of *Connelly*, the Fifth Amendment privilege and the due process confession rule are even more alike than their common law counterparts. Consequently, in most instances we should prefer the privilege over the due process rule in determining whether a confession is admissible.

In *Connelly*, however, Chief Justice Rehnquist's opinion implied a preference for using the due process rule to determine the admissibility of confessions in cases of police interrogation that are outside *Miranda*. Before *Malloy v. Hogan*, the Court had to use the due process rule because the Fifth Amendment privilege was not applicable to state proceedings. Had it not done so, it would have been unable to impose constitutional restraints on even the most abusive interrogation. For the past twenty-seven years, however, the privilege has been applicable. It deals explicitly with compulsory incrimination; the Due Process Clause does not. Given the striking similarity of the constitutional protections and the fact that the due process rule serves virtually no independent purpose, the Court's preference for a due process approach is doctrinally baseless and should be abandoned in favor of an analysis which relies explicitly on the privilege.

The second question with which I have been concerned is whether, as Wigmore implied and McNaughton insisted, the privilege is inapplicable to police interrogation. This question is related to the first: if the privilege is inapplicable, then the Court must use a due process approach (however flawed it may be) or abandon all regulation in state cases. The Wigmore/McNaughton position rests on an assumption that all privileges are inherently linked to proceedings in which a questioner has the authority to impose or seek the sanction of contempt for refusal to answer. The assumption is groundless. It is contrary to the policies underlying evidentiary privileges in general and the

cases interpreting and applying privileges. Nor does it find support in the history, operations, and objectives of the privilege against compulsory self-incrimination, or in more general policy considerations. Indeed, to the extent that these matters speak at all, they speak in favor of applying the privilege to police interrogation.

The conclusions of this Article will be no panacea. Even if courts abandon due process analysis and use only the privilege to determine the admissibility of confessions obtained by governmental action, they will still have to decide whether the defendant's confession was "compelled" in violation of the Fifth Amendment. Like "involuntary," "compelled" is not clear, and its ambiguity will leave room for maneuver. It will, however, leave *considerably* less room than an involuntariness approach. Some will oppose this restriction on police interrogation. In his *Miranda* dissent, Justice Harlan observed that, under the due process approach, "in practice and from time to time in principle, the Court has given ample recognition to society's interest in suspect questioning as an instrument of law enforcement. Cases countenancing quite significant pressures can be cited without difficulty, and the lower courts may often have been yet more tolerant."⁷⁸⁶ Justice Harlan did not rue this development. Rather, he decried the majority's use of the privilege in place of the due process analysis.

Certainly the privilege does represent a protective concern for the accused and an emphasis upon accusatorial rather than inquisitorial values in law enforcement Accusatorial values, however, have openly been absorbed into the due process standard governing confessions. . . . Since extension of the general principle has already occurred, to insist that the privilege applies as such serves only to carry over inapposite historical details and engaging rhetoric and to obscure the policy choices to be made in regulating confessions.⁷⁸⁷

It is not clear which historical details Justice Harlan had in mind or why he regarded them as inapposite to police interrogation. It is clear, however, that a preference for the due process voluntariness test is a preference for a judicial construct the history of which obscures underlying values. It is also clear that obscuring underlying values facilitates "policy choices" that countenance "quite significant pressures" in the service of law enforcement, but in derogation of individual dignity, autonomy, and privacy. "There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand."⁷⁸⁸

⁷⁸⁶ *Miranda v. State of Arizona*, 384 U.S. 436, 509 (1966) (Harlan, J., dissenting) (footnote omitted).

⁷⁸⁷ *Id.* at 511.

⁷⁸⁸ *Terry v. Ohio*, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting).

The genius of the privilege is precisely that it is not a judicial construct, that it *has* a vivid history, and that it *illuminates* underlying values. Using the privilege will not remove the necessity for making policy choices. It will, however, force judges to take their thumbs off the scale and to give fair weight to dignity, autonomy, and privacy. When judges strike this delicate balance, is it too much to ask that the shade of John Lilburne be in the courtroom?

